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REPORTS

OF

CASES IN LAW AND EQUITY,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

FROM MILLEDGEVILLE TERM TO DECATUR TERM, 1855, INCLUSIVE.

THOS. R. R. COBB, Reporter.

VOL. XVIII.

No.
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REYNOLDS & BRO.
1855.

TABLE OF CASES REPORTED IN THIS VOLUME.

ALPHABETICALLY ARRANGED.

A.

Adams, gr. *et al. vs.* Bass, ex'r.... 130
Allen, Harris *et al.* ex'rs, *vs.*..... 177
Andrews, Bartee *vs.*..... 407
Armistead *vs.* The State..... 704
Armstrong *vs.* The O. B. & T. Co. 607
Arnold, Way *vs.*..... 181

B.

Banks *vs.* Darden..... 318
Bartee *vs.* Andrews..... 407
Bass, ex'r, *vs.* Adams, guar. *et al.* 130
Bass, ex'r, Hunter *et al. vs.*..... 127
Beall *et al. vs.* Cochran, adm'r..... 38
Beatly, adm'r, Woolfolk *vs* 520
Beckham, Buchanan *vs.*..... 527
Bellamy, adm'r, McDougald *vs.*... 411
Behn & Foster *vs.* Phillips..... 466
Bennett, Terrell *vs.*..... 404
Bexly, Methvin *vs*..... 551
Booth *vs.* Terrell..... 570
Bradshaw, Perdue *vs.*..... 287
Brannan *vs.* The Central Bank.... 361
Brooks. Smith and another *vs*..... 440
Buchanan *vs.* Beckham..... 527
Bullock, Burkhalter *vs*..... 371
Bulloch, Shockley *vs*..... 283
Burkhalter *vs.* Bulloch..... 371
Burkhalter *vs.* Wells..... 367
Burtine *vs.* The State..... 534
Butler *vs.* The Mar. F. I. Bank.... 517

C.

Calloway, Dawson *vs.*..... 513
Carhart, Bros. & Co. King and another..... 650
Chapman *vs.* The State..... 736
Chenault, Sutton *vs*..... 1
Clark *vs.* Tuggle..... 604
Cobb, Gov. &c. Liceth *et al. vs.*.... 314
Cochran, adm'r, Beall *et al. vs.*.... 38
Cogburn, adm'r, *vs.* Ogleby, adm'r 56
Collier *vs.* Lyons..... 648
Compton. Sur. McKenney *et al. vs.* 170
Coalson *vs* Tooke..... 742
Coursey *vs.* Curtis..... 237
Cox *vs.* Rutledge *et al*..... 294
Cox *vs.* The Mayor, &c. Griffin.... 728
Crawford, ex'r, Jones *vs*..... 281
Crawford, Wood and another *vs.*.. 526
Croft *vs.* The Justices, &c 473
Currell *vs.* Phillips..... 469
Curtis, Coursey *vs*..... 237

D.

Darden, Banks *vs*..... 318
Davis, Keaton *vs*..... 457
Davis, adm'r, The Macon & W. R. R. Co. *vs*..... 679
Davis & Mizell *vs.* Stanford..... 289
Davis, Moran *vs*..... 722
Dawson *vs.* Calloway..... 573
Dickey, Norwood *vs*..... 528
Dougherty, Girardey and another *vs* 259
Durand *vs.* Grimes..... 693

E.

Edwards *vs.* Perryman *et al*..... 374
Ellis, Perdue *vs*..... 586

F.

Faircloth *vs.* Jordan..... 350
Frith *vs.* Frith..... 273

G.

Girardey and another *vs.* Dougherty..... 259
Goddard, Terrell *vs*..... 664
Greene, Harrell *vs*..... 711
Greer *et al.* Griswold *et ux vs*..... 545
Griffeth, Lessee, *vs.* Wright..... 173
Grimes, Durand *vs*..... 693
Griswold *et ux vs.* Greer *et al*..... 545

H.

Hall *vs.* Hall..... 40
Hamilton *vs.* Reese..... 8
Hampton *vs.* Hampton..... 513
Hancock *vs.* Ross..... 364
Harden *et al. vs.* Mangham, ex'r.. 563
Harrell *vs.* Greene..... 711
Harris *et al.* ex'rs, *vs.* Allen..... 177
Hart and another *vs.* Holly and another..... 378
Hart *vs.* Powell..... 635
Hatcher *vs.* The State..... 460
Hawks *vs.* Patton..... 52
Heard *vs.* Heard..... 789
Holly and another, Hart and another *vs*..... 378

L.L.
U.S.A.
Ga.100
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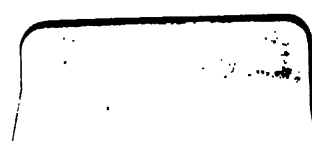

ABLE OF CASES REPORTED IN THIS VOLUME,

NGED IN THE ORDER OF THEIR DECISION, WITH A NOTE OF THE QUESTIONS OF LAW CONSIDERED.

MILLEDGEVILLE—*May Term*, 1855.

1. F. S. Sutton *vs.* J. N. Chenault. *Wills of Personalty. Probate*..... 1
2. M. Roberts *vs.* E. H. Walker. *Residence of Ward.* 5
3. T. N. Hamilton *vs.* W. M. Reese, adm'r. *Interest against Trustees*..... 8
4. T. Willis *vs.* R. V. Willis, adm'r. &c. *Charge. New Trial*..... 13
5. A. Stokes *vs.* The State. *Manslaughter. Impeaching Witnesses*..... 17
6. C. C. Beall *et al. vs.* A. E. Cochran, adm'r. *Judgment. Effect of Appeal of Principal*..... 38
7. J. Hall *vs.* S. Hall. *Witnesses to Will. Capacity.* 40
8. J. H. Reynolds *et al. vs* Jas. Lofton *et al. County Tax. Collector's Bond*..... 47
9. S. Lindsay *et al. vs.* A. D. Hunter. *Insolvent Debtors*..... 50
10. W. H. Hawks *vs.* M. J. Patton. *Evidence. Pleading*..... 52
11. J. A. Cogburn, adm'r. *vs.* H. J. Ogleby, adm'r. *Construction of Legacy*..... 56
12. W. Robinson *et al. vs.* The State of Georgia. *Liability of State for Debts of Bank of Darien*..... 65
13. J. W. Walker *et al. vs.* H. P. Wooten *et al. Trust. Statute of Limitations*..... 115
14. S. Hunter and The Am. Col. Soc. *vs.* N. Bass, ex'r. *Parties. Slaves*..... 12
15. D. R. Adams, guar. *vs.* N. Bass, ex'r. *Cyprès. Construction of Will*..... 1

16. J. McKenny *et al. vs.* P. M. Compton. *Limitation as to Grants*..... 170
17. The lessee of Griffith *et al. vs.* J. G. Wright. *Attacking Letters of Administration*..... 173
18. Y. L. G. Harris *et al. vs.* Jane L. Allen. *Interest on Advancements*..... 177

AUGUSTA—*June Term*, 1855.

19. W. J. Way *vs.* R. J. Arnold. *Evidence. Estoppel.* 181
20. H. C. Keener *vs.* The State. *Evidence. Homicide*..... 194
21. J. B. Coursey *vs.* D. L. Curtis. *Possessory Warrant*..... 237
22. Jno. Miller *vs.* J. M. Reinhart. *Proof of Naturalization*..... 239
23. J. W. Jones *vs.* the Central R. R. Co. *Proceedings vs. R. R. Cos. Notice*..... 247
24. Ed. Girardy and another *vs.* Jno. Dougherty. *Relief of Administrators' Sureties*..... 259
25. B. J. Wasden *vs.* The State. *Adultery and Fornication Reasonable Doubt*..... 264

AMERICUS—*July Term*, 1855.

26. T. D. Frith *vs.* F. Frith. *Temporary Alimony*..... 273
27. Jno. G. Winter *vs.* The State. *Surprise*..... 275
28. Seaborn Jones *vs.* F. M. Lawrence. *Judgment on Foreclosure of Mortgage*..... 277
29. J. Jones *et al. vs.* Crawford, ex'r. *Writ of Error. Appeal*..... 281
30. W. D. Shockley *vs.* C. Bulloch. *Attachment by Sureties*..... 283
31. A. J. Perdue *vs.* Jno. Bradshaw. *Nunc pro tunc Judgments*..... 287
32. Davis & Mizzell *vs.* Stanford. *Witness. Competency* 289
33. B. Manes *vs.* S. Kenyon. *Deceit*..... 291
34. Jas. Cox *vs.* J. Rutledge *et al.* *Evidence*..... 294

35. W. Liceth *et al.* *vs.* Cobb, Gov. &c. *Bail Bond in Criminal Cases*..... 314
36. T. Swearingen *vs.* N. Swearingen. *Divorce*..... 316
37. Jno. Banks *vs.* H. D. Darden. *Liability of Bank Directors*..... 318
38. James Mathis *vs.* The State. *New Trial*..... 343
39. H. Jacobs *vs.* Jos. Pou, adm'r, &c. *Letters Dismissory*..... 346
40. S. Faircloth *vs.* B. S. Jordan. *Witness. Deed. Forgery*..... 350
41. William (a slave) *vs.* The State. *Offences by Slaves.* 356
42. T. A. Brannon *vs.* The Central Bank. *Rules vs. Sheriff. Practice*..... 361
43. T. B. Hancock *vs.* C. Ross. *Assumpsit. Contract* 364
44. D. N. Burkhalter *vs.* W. Wells. *New Trial*..... 367
45. J. Turner *vs.* J. Joiner. *Establishment of Lost Deeds to Land*..... 368
46. D. N. Burkhalter *vs.* C. Bulloch. *Amending Appeal*..... 371
47. O. Edwards *vs.* J. Perryman *et al.* *Injunction. Equity Practice*..... 374
48. J. Hart and another *vs.* S. Holly and another. *Pleading*..... 378
49. D. H. Wright *vs.* The State. *Criminal Law*..... 388
50. W. B. Horton *vs.* A. Johnson and Wife. *Attestation of a Will*..... 396
51. Jas. B. Neal *vs.* A. E. Robinson. *Action for Land, under the Act of* 1847..... 399
52. Sackett, Davis & Potter *vs.* Tucker *et al.* *Bail Bond* 401
53. S. L. Terrell *vs.* W. B. Bennett. *Deceit*..... 404
54. T. P. Bartee *vs.* J. Andrews. *Discovery at Law. Liquidated Demand*..... 407
55. A. E. McDougald, adm'x, *vs.* Bellamy, adm'r, &c. *Stockholder's Liability*..... 411
56. L. Napier *et al.* *vs.* J. H. Howard *et al.* *Decree. Correction. Wife's Equity*..... 437
57. W. Smith and another *vs.* W. S. Brooks. *Parol Evidence. Fraud*..... 440

58. A. E. McDougald, adm'x, *vs.* R. A. Lane. *Stockholder's Liability*..... 4
59. B. O. Keaton *vs.* J. M. Davis. *Money paid for another*..... 4
60. Thomas Hatcher *vs.* The State. *Practice. Criminal Law*..... 4
61. Behn & Foster *vs.* John N. Phillips. *Alienation pending Appeal*..... 4
62. G. Currell *vs.* John N. Phillips. *Rule vs. Sheriff*.. 4
63. M. Hooks *vs.* M. G. Stamper. *Appeal. Void Probate*..... 4
64. The Justices, &c. *vs.* G. W. Croft. *Injunction. Inferior Court*..... 4
65. J. E. Knowles *et al. vs.* W. J. Lawton *et al. Mortgages. Purchasers*..... 4
66. J. S. Miller *et al. vs.* I. J. Sanders *et al. Bill Quia Timet. Equity Practice*..... 4
67. N. McNabb *vs.* Lockhart & Thomas. *Bailment. Evidence*..... 4
68. A. Y. Hampton *vs.* John R. Hampton. *Estates of Trustees*..... 5
69. G. Butler *vs.* Marine & Fire Insurance Bank. *Notes Payable at Bank Agencies*..... 5
70. Hopkins, Allen & Co. *vs.* J. L. Suddeth *et al. Certiorari. Practice*..... 5
71. J. Woolfolk *vs.* J. Beatty, adm'r, &c. *Laches. Presumption of Administration*..... 5
72. James Wood *et al. vs.* S. T. Crawford. *Ordinary Courts. Jurisdiction*..... 5
73. John Buchannan *vs.* S. G. Beckham. *Lost Papers. Parties*..... 5
74. W. Norwood *vs.* J. Dickey. *Milldam. Injunction* 5
75. R. Jordan *vs.* The State. *Demand for Trial*..... 5
76. J. M. Burtine *vs.* The State. *Error. New Trial*.. 5
77. S. Jones *vs.* The Water Lot Co. *Trespass. Riparian Rights*..... 5

DECATUR—*August Term*, 1855.

78. Griswold and Wife *vs.* T. R. Greer *et al.* *Remainders. Bequest*..... 545
79. W. Methvin *vs.* Jas. Bexly *et al.* *Equitable Relief* 551
80. D. Sanford, admr. &c. *vs.* J. Thompson *et ux.* *Conflict of Laws*..... 554
81. John Harden *et al.* *vs.* W. E. Mangham, ex'r, &c. *Manumission*..... 563
82. J. W. Poole *vs.* The State. *Continuance*..... 567
83. M. Booth *vs.* R. Terrell. *Loan. Remainder*.... 570
84. E. J. Dawson *vs.* Jas. Calloway. *Evidence. Statute of Limitations*..... 573
85. Jas. B. Perdue, Clerk, &c. *vs.* W. J. Ellis. *Constitutional Law. Retail Licenses*..... 586
86. Jacob Clark *vs.* Jer. B. Tuggle. *Att. and Bail at the same time*..... 604
87. J. W. Armstrong *vs.* The Oglethorpe T. & B. Co. *Appeals from Awards*..... 607
88. Wooten & Co. *vs.* A. M. Nall. *Party a Witness. Appeal by one*..... 609
89. Sol. Hart *vs.* R. Powell. *Declarations of Slayer* 635
90. The Holston Man. Co. *vs.* Lea. *Affidavit in Attachment*..... 647
91. B. W Collier *vs.* J. E. Lyons. *Liability for loss of Slave*..... 648
92. W. H. King and another *vs.* Carhart, Bros. & Co. *Garnishment. Negotiable Paper*..... 650
93. A. P. Powers *vs.* The Central Bank. *Set-off*..... 658
94. S. L. Terrell *vs.* A. B. Goddard. *Partners. Receiver*..... 664
95. Lavender *et al.* *vs.* Thomas *et al.* *Fraudulent Assignments. Equity*..... 668
96. The Macon & Western R. R. Co. *vs.* J. M. Davis, adm'r, &c. *Pleadings by Administrators, &c. Liabilities of R. R. Co*..... 679
97. N. C. Sample *vs.* H. Lipscomb. *Admissions by Administratrix*..... 687

98. John W. Murphy *vs.* J. S. Winter & Co. *Suits against Transient Persons. Bail by Agent*..... 69[illegible]
99. S. A. Durand *vs.* T. W. Grimes. *Practice. Charge* 69[illegible]
100. C. Leary *vs.* M. Leary. *Divorce. Evidence*..... 69[illegible]
101. D. Armistead *vs.* The State. *Accomplice. Justifiable Homicide*..... 70[illegible]
102. W. Woodsworth *vs.* J. Thompson, adm'r. *Practice of Superior Court*..... 70[illegible]
103. Jas. Harrell *vs.* J. W. & J. M. Greene. *Issue of Slaves. Legacy*..... 71[illegible]
104. F. H. Murdock *vs.* W. G. Little. *Jurisdiction. Land Suits*..... 719
105. A. B. Moran *vs.* G. Davis. *Runaway Slaves*..... 722
106. W. A. Joice *vs.* J. and P. Scales. *Conflict of Laws. Constitutional Law*..... 725
107. P. B. Cox *vs.* The Mayor &c. Griffin. *Bill by City Council*..... 728
108. W. B. Chapman *vs.* The State. *Criminal Law*... 786
109. W. S. Heard *vs.* A. B. Heard. *Certiorari on Possessory Warrant*..... 739
110. S. H. Coalson *vs.* Jos. Tooke. *Probate of Will. Infant*..... 742
111. John Neal *vs.* H. G. Lamar *et al.* *Dormant Judgments. Witness*..... 746

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

AT MILLEDGEVILLE,

MAY TERM, 1855.

Present—JOSEPH H. LUMPKIN, EBENEZER STARNES, HENRY L. BENNING. } *Judges.*

No. 1.—FRANCIS S. SUTTON, plaintiff in error, *vs.* JOHN N. CHENAULT, defendant in error.

[1.] The Act of February 16th, 1852, requiring, that from and after the 1st day of June thereafter, all wills and testaments of personal property should be attested by three or four credible witnesses, and declaring that all laws of force in this State prescribing the mode of proof of devises of personal property, shall be extended to wills of personal property, applies to and controls the proof of a will of personal property, which had been executed before the passage of that Act—the testator having died after the same had gone into effect.

Caveat, &c. in Lincoln Superior Court. Tried before Judge ANDREWS, October Term, 1854.

The questions made in this case arose upon a caveat to the will of George N. Chenault, propounded for probate as to the per-

sonalty of the decedent. The will was dated 16th February, 1850. The decedent died 13th October, 1853. The will was attested by one witness, who testified that the testator stated that he thought two other witnesses were necessary, and named two individuals whom he intended to procure as witnesses. The decedent said, at the time, that that was his will. The will was caveated on the grounds—1st. That it was unfinished, and so considered by testator. 2d. That it was not attested as required by the Act of the Assembly of 1851–'2, requiring wills of personalty, after the 1st June, 1852, to be executed with the same solemnities required for bills conveying real estate.

Upon the trial, the Court sustained both the grounds stated in the caveat, and so charged the Jury. Upon this charge error is assigned.

IRVIN & BARNETT, for plaintiff in error.

REESE; TOOMBS; T. W. THOMAS, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

On the 16th day of February, 1850, the last will and testament of George S. Chenault, which is now before us, was executed—one witness only attesting the same. On the 21st day of January, 1852, an Act was passed by the Legislature of this State, requiring that from and after the 1st day of June, 1852, all wills and testaments of personal property should be attested by three or four credible witnesses, and declaring that all laws of force in this State prescribing the mode of proof as to devises of real estate, should be extended to wills of personal property.

On the 30th day of October, 1852, George S. Chenault died, and the instrument now under consideration has been offered for probate, as a testamentary disposition of his personal estate.

The question presented by this state of facts is, whether or

not the Act just mentioned is to regulate the mode of proof as to this instrument; that is to say, whether it is to be controlled by the law, as it existed at the execution of the will, or at the death of the testator.

In similar cases, there seems to have been some conflict of opinion among Judges.

In the case of *Gilmore vs. Shorter*, (2 *Mod.* 310,) where a special verdict was found upon the Statute of Frauds, which enacts, that from and after the 24th day of June, in the year 1677, no action shall be brought to charge any person upon any agreement made in consideration of marriage, &c. unless such agreement be in writing; and the case being upon a bare promise, without writing, judgment was given for the plaintiff, as "it could not be presumed that the Act had a retrospect to take away an action to which the plaintiff was then entitled; for if a will had been made before the 24th day of June, and the testator had died afterwards; yet, the will had been good, though it had not been in pursuance of the Statute."

The case of *Ashburnham vs. Bradshaw* (7 *Mod.* 239,) was upon a devise made before the Statute of *George II.* avoiding devises to charitable uses. The testator died after the Statute was passed. Ten out of the twelve Judges held that the land would still pass under the will; but they gave no reasons for their opinions.

And in the case of *Downs vs. Townsend*, (*Ambler*, 290,) Lord *Hardwicke* is reported to have said, that "the general rule as to testaments is, that the time of the testament, and not the testator's death, is regarded."

Probably, basing their opinions upon the authority of these cases, other and more modern Courts have adopted the rule, that the mode of proof must be regulated by the law of force at the time the will is executed. But in all the cases to which we have referred, it seems likely that the Courts had in mind the rules which control devises of real estate, and were influenced by these. The *dictum* in the first was hastily announced by way of illustration, and without reason assigned. The second was a case of real estate. In the third, it is said

that Lord *Hardwicke*, at the time, was speaking of the intention of a testator as expressed in a specific bequest, and had no reference to the execution of a will, nor the time from which it should take effect. *Elcock's Will*, (4 *McCord*, 39.)

However this may be, a distinction obtained in the English Courts between wills of real and personal property, out of which rightly sprung, as we think, another rule. That distinction is this: "A devise of lands is considered not so much in the nature of a testament as of a conveyance, by way of appointment of particular lands to a particular devisee; therefore, it was established that a man can devise those lands only which he has at the date of such conveyance; and no after purchased lands will pass, whatever words may be used; whereas, a will and testament will operate upon whatever personal estate a man dies possessed of, whether acquired before or since the execution of the instrument." (*Co. Litt.* 111.) This distinction was relied upon by Lord Chancellor *Northington*, in the case of *Attorney General vs. Hartwell*, (*Amb.* 45,) as a reason why the case of *Ashburnham vs. Bradshaw* (above cited) did not control the proof of a will of personal property; and it has been frequently recognised since. (*Harwood vs. Goodright, Cowp.* 90. *Lord Mansfield at* 1 *Saund.* 276, *f, note* 4 *to Duppa vs. Mayo. In Re. Elcock's Will*, 4 *McCord*, 39.)

As, therefore, all the personal estate which a man has at the time of his death passes by his will, and as a will of personal property is considered as having existence only from the death of the testator, and not from the time of its execution, it has been held, that the mode of proving such a will should be regulated by the laws of force at the death of the testator.

We prefer, upon principle, to adopt this view of the case, and to hold, that inasmuch as the Act in question was a law in force at the death of this testator, it applies to and controls the proof of his will.

It will be observed, that in this view of the case, no retroactive effect is given to the Statute. But it is held to apply, because of force at the time the instrument became the testator's will.

We may add, that the language of the Act favors this view of the subject; that prospective operation was given to it, and time thus allowed, as if for the purpose of affording an opportunity to those who had previously made their wills, to alter them, so as to meet the requirments of the Act;

Let the judgment be affirmed.

No. 2.—MICHAEL ROBERTS, propounder, &c. plaintiff in error, *vs.* ELI H. WALKER, caveator, &c. defendant in error.

[1.] When the ward has come to years of discretion, the residence of the guardian is not the residence of the ward, unless the ward choose to make it his residence.

Caveat to will, in Jasper Superior Court. Tried before Judge HARDEMAN, April Term, 1855.

The only question in this case was, the right of the Court of Ordinary of Jasper County to jurisdiction of the probate of the will of James M. Johnston, upon this state of facts: James M. Johnston was a minor, about 20 years of age; his father resided in Butts County at the time of his death; his mother, after she became a widow, lived and died in Jasper Co. In 1839, one Littlejohn, of Monroe County, was appointed guardian of James M. Johnston by the Court of Ordinary of Jasper County. In 1847, he removed his guardianship to Monroe County and there died. In 1849, E. G. Cabiness was appointed guardian by the Ordinary of Monroe County. The ward resided with Littlejohn & Cabiness, in Monroe County. He went, by consent of Cabiness, to Jasper County, to visit his relatives, promising to return. He afterwards sent for his trunk and refused to return, though requested

and commanded by Cabiness. He remained there several months, and made this will while there, and there died. In the meanwhile, Cabiness was elected and qualified the Ordinary of Monroe County, and his letters of guardianship thereby abated.

The Court below charged the Jury—1. That although the letters of guardianship to Cabiness abated on his election, yet, he continued to have control of the person and property of Johnston until the appointment of another guardian.

2. That James M. Johnston, after the abatement of said letters, could not acquire a residence out of Monroe County, without the consent and acquiescence of said Cabiness.

3. That although said Johnston may have intended to have made Jasper County his residence, and actually lived there at the time of his death, he could not make it his residence without the consent and acquiescence of his guardian.

Error is assigned upon each one of these charges.

LOFTON; A. REESE, for plaintiff in error.

O. C. GIBSON, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] In *The King against Greenhill*, (4 *Adolph. & Ell.* 624,) Lord *Denman*, C. J. says: "When an infant is brought before the Court by *habeas corpus*, if he be of an age to exercise a choice, the Court leaves him to elect where he will go. If he be not of that age, and a want of direction would only expose him to dangers or seductions, the Court must make an order for his being placed in the proper custody," "and that, undoubtedly, is the custody of the father." In these positions the Chief Justice is supported by a number of cases. Among these are *Rex vs. Smith*, (2 *Strange*, 982.) *Rex vs. Clarkson*, (1 *do.* 444.) *Rex vs. Johnson*, (1 *do.* 579.) *Rex vs. Delavel*, (2 *Burr.* 1434.) *Lady Henrietta Berkley's*

Lee, (3 *Harg. St. Tr.* 544,) (*stated in Forsyth's Custody of Infants*, 99 *Law Lib.*)

In this case the infant was twenty years old, and engaged to be married. He was therefore "of an age to exercise a choice" as to "where" he would go.

According to these authorities, then, even if Cabiness had been still guardian, and had caused the infant and the person with whom the infant stayed, to be brought before a Court on *habeas corpus*, the only result would have been an option presented by the Court to the infant, to go with his guardian or not, just as he, the infant, might please. The Court would not have compelled the infant to *reside* with the guardian.

Nor is there any other mode, as far as I know, by which a guardian, in such a case, might better get the custody of his ward, than he could by this of *habeas corpus*. To obtain such custody in a case of the kind of this, who would the guardian have to sue? The infant? What would be the form of the suit? what the form of the judgment? what the form of the execution? Suppose this infant's contemplated marriage had been consummated, could the guardian, by any process known to law, have separated the infant from his wife and compelled him to reside with him, his guardian?

The guardian, then, not having the power, to compel his ward to reside with him, if the ward has arrived at years of discretion, it follows that the residence of the guardian of such a ward is not the residence of the ward, if the ward choose not to make it his residence.

In this case, the ward having been a person twenty years old, chose not to make the residence of his guardian his residence. He elected to reside with others, and others of a different county from that of his guardian, viz: the County of Jasper.

His residence, therefore, was in Jasper and not in Monroe, where his guardian, or late guardian, resided.

This seems to be the conclusion to be drawn from the Common Law; and our Statute but confirms it:

"The place where the family of any person shall permanently reside, in this State, and the place where any person having no family shall generally lodge, shall be held and considered as the most notorious place of abode of such person or persons, respectively." (*Cobb's Dig.* 530.)

The charge of the Court below was therefore, as we think, erroneous.

No. 3.—THOMAS N. HAMILTON, plaintiff in error, *vs.* WM. M. REESE, administrator, defendant in error.

[1.] In settling with trustees for balances in their hands, simple interest is the rule—compound interest or rests, the exception.

[2.] To justify compounding or rests, a special case is required, such as that the trustee applied the fund to his own benefit in trade, sold the trust stocks and applied the proceeds to his own use, or refused to follow the directions of the deed creating the trust, as to investments, or has conducted himself fraudulently in the management of the fund.

[3.] Mere negligence will not justify rests; there must be corruption or gross delinquency. *Fall vs. Simmon*, (6 *Ga. R.* 265,) reviewed and approved.

Debt, in Wilkes Superior Court. Tried before Judge IRVIN, September Term, 1854.

In 1818, Thomas N. Hamilton and Thomas P. Randolph were appointed the committee of Augustus Napier, a lunatic, by the Superior Court of Columbia County; and by their commission, were required to make returns from time to time to said Court. In 1830, Thomas P. Randolph removed to the State of Florida, and subsequently died, having first placed funds in the hands of Robert R. Randolph to discharge his liability as committee. In 1849, Robert R. Randolph, by sealed bond, *obligated himself to pay* to Thomas N. Hamilton, surviving

committee, "whatever sum shall appear to be due and payable by the estate of Thomas P. Randolph, to the estate of the said lunatic, the amount to be determined by an examination of the records where his returns were made." On the trial of the suit on this obligation, it appeared that Thomas P. made two returns—one in 1829, showing receipts $1080, and small disbursements. Another in 1830, of small disbursements, and no more. The Court charged the Jury, that in arriving at the amount due by the estate of Thomas P. Randolph, they should allow only running or simple interest, without compounding at the end of every six years, as contended for by plaintiff.

This charge is assigned as error.

T. R. R. COBB, for plaintiff in error.

WM. REESE, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The only question in this case is, should simple or compound interest be computed, on the balance in the hands of Thomas R. Randolph?

The argument seems to assume, that an arbitrary rule was prescribed by this Court in *Fall vs. Simmons*, *in* 6 *Ga. R.* 265, to the effect, that on all balances in the hands of trustees, interest should be compounded every six years. This is a mistake; on the contrary, referring to the fact that the Legislature had, two years before that case was decided, prescribed a general rule upon this subject, applicable to all trustees, as well those already qualified, as such as might thereafter be appointed, we felt ourselves relieved, of course, from the necessity of laying down any rule, and simply affirmed the decree of the Circuit Court, making rests at the end of every six years. The Judge who wrote out that opinion did state the general doctrines deducible from the author-

ities upon this question. He said that simple interest was the rule and rests the exception. In other words, in order to charge compound interest, there must be a special case. He went further and specified, by way of illustration, what would constitute such a case. "For example," says the learned Judge, "if the trustee applies the fund to his own benefit in trade, or sells trust stocks and applies the proceeds to his own use, or refuses to follow the directions of the deed enacting the trust as to investments, or conducts himself fraudulently in the management of the funds, *and in all other instances depending upon like principles*, Chancery will direct the compounding of the interest."

[2.] And it seems that Sir *Thomas Plumer*, the Vice Chancellor in *Tebbs and others against Carpenter and others* (1 *Maddock's Ch. R.* 162,) after a most elaborate review of all the authorities, arrives at the same conclusion, namely: that a special case is necessary to induce the Court to charge trustees with more than 4 per cent. upon the balances in their hands, that being the usual and ordinary rate of interest on such balances.

Whether this case be tested, then, by *Fall and Simmons* or *Tebbs and Carpenter*, the inquiry is, does it come within the general rule or the exception?

What is the case made upon the record? That the committee-man having, in 1830, removed from this State to Florida, and has made no returns since—the debts and credits standing upon the records of his return just as he left them at that time. If this be not an ordinary case, and consequently, falling within the rule, it is difficult to imagine one that would. What is there special in it, to make it an exception? Nothing is suggested in the pleadings or proof. In the language of this Court already cited, it does not appear, nor does even the presumption arise, that this trustee had applied the fund for his own benefit in trade; it is not pretended that he sold stocks belonging to his *cestui que trust* and applied the proceeds to his own use; he has violated no directions which it was obligatory upon him to ob-

serve; nor is charged that he has conducted himself fraudulently in the management of the trust.

[3.] *Negligence* in not collecting the money and re-investing it, is the worst and all that can be imputed to the trustee; and we apprehend no precedent goes to the length of holding that this, of itself, constitutes such "gross delinquency" as will authorize compound interest to be charged by way of penalty.

Concurring fully, as we do, in the proposition, that every case of this sort must stand upon its own peculiar circumstances, any reference to precedents might seem unnecessary. I beg leave, however, to advert, for a moment, to the facts in *Hall and Simmons*, partly for the purpose of vindicating that judgment; but mainly to show how easy it is to confound cases whose facts are wholly dissimilar. If the adjudications of this Court were more *carefully studied* we should escape such unmerited censure. Examine the facts—the exceptions or assignments of error and the judgment—so far, the case is authority. All else, I will not say, is "leather and prunella," but I will say, is mere *obiter dicta*, and should be noted only as such.

The intestate, Trimble, died in December, 1827. In February, 1828, the inventory was made and returned. In the same month, the administrator, Dr. Fall, returned the sale bill, including a tract of land, and a schedule of notes, rents, &c. In 1829, he made a return of *disbursements*. In December, 1834, he made another return of *disbursements*. And in 1845, after the filing of the bill against him by the distributees, he made another return, embracing both debits and credits. These are all the facts which appear in the report of the case. In the Circuit Court, as well as in this Court, an exemplification was exhibited, taken from the records of the Ordinary, upon which was spread out all the items of the several returns, both as it regards dates and amounts; and the result was, and the statement, in the opinion of the Court, shows as much, that while the assets of the estate came into the hands of the administrator as early as 1827, he never made

mention of them thereafter, while, for the eighteen years that followed, he was making disbursements, more or less, *annually*, in behalf of the estate.

Would simple running interest have been just under such circumstances? Unquestionably not. By the Statute Law of this State, expenditures must first be made out of the accruing income; and no part of the principal can be touched, unless by order of the Court or under special circumstances. At any rate, the yearly profits or interest must be first exhausted. Gross injury would have resulted to the heirs of Trimble, without compounding. Charge running interest only on the money which come into the hands of Dr. Fall in 1828, and then allow him interest on his annual disbursements, from that year down to 1845, when he made his last return, or to 1849, when the final decree was rendered, and you will consume the original capital entirely, without the trustees ever having paid one dollar of it.

Take, for example, the mercantile mode of computing interest upon notes. Debit yourself with a note of $500; pay the interest *only*—that is, $35 yearly; and in the final settlement, charge running interest on the note, (representing the cash fund, and which come into the hands of the trustee,) and set off against this the annual payments of the interest, with interest thereon from the time they were made, (representing the yearly disbursements,) and by this method, in the course of time, as it is easy to demonstrate, the original debt of $500 will have been discharged, without one dollar of the principal ever having been paid.

And in this way great injustice has likely been often done, unintentionally, in settling estates.

Our Statute regulating interest is wrong, and that of Connecticut is the only one in the Union that is right upon the subject of interest. Interest is the compensation fixed, by law, for the use of money for twelve months. By our Act, every payment amounts to a renewal of the note, although made a dozen times or oftener during the year; because it is provided, that the payment shall first be applied to the ex-

tinguishment of the interest which has accrued up to that time. And then, on the other hand, should the debt be suffered to run for more than a year after due, compound interest is not allowed. Both of these provisions are wrong. By the Connecticut Statute annual rests are made on all debts; and interest on the principal is counted for the year, irrespective of any intermediate payments; and interest is calculated in favor of the debtor on these payments, and a balance struck at the end of each year.

This is as it should be.

Judgment affirmed.

No. 4.—THOMAS WILLIS, plaintiff in error, *vs.* ROBERT V. WILLIS, adm'r, &c. defendant in error.

[1.] The Court cannot be said to charge upon a hypothetical state of facts, when there is any evidence, whatever, to authorize the charge.

[2.] Though there be a preponderance of testimony against the verdict, yet, a new trial will not be granted, unless the Court believe the verdict to be decidedly and strongly against the weight of evidence.

Trover, in Baldwin Superior Court. Decision by Judge JACKSON, at August Term, 1854.

This was an action of trover by Robert V. Willis, as adm'r of Keziah Willis *vs.* Thomas Willis, for sundry negroes, the descendants of a negro woman, Esther. It was proven that Keziah Willis died in possession of the negroes, and had them in possession for twenty years. Keziah Willis and Thomas Willis (her son) lived on the same premises, but in different houses, and had separate fields. Thomas Willis had a general control of all the property. Mrs. Willis employed a separate overseer for one year. The negroes sometimes worked all the

fields. Various expressions of intention by Mrs. Willis, to give these negroes to different persons, were in evidence. The negro Esther was in Alabama, and Thomas Willis went after her and brought her away. He proved by one Isaac Golden, that 17 or 18 years ago, he heard Mrs. Willis say that she owned a negro Esther, in Alabama, and that she told Tom, that "if he would go after her he might have her;" and that after Tom got back, he heard the old lady say that Tom had gotten back with the negro that she gave him. There was evidence that Mrs. Willis, at some times, said she gave the negro to Tom at her death; at others, that she intended him to have them; at others, that she intended them for a daughter in Alabama; but that the daughter had died. There was also in evidence a deed of gift, from Mrs. Willis to Thomas Willis, to one of the children of Esther, of a date subsequent to the alleged gift, and by him placed on record.

The Court charged the Jury, among other things, "that if they believed Mrs. Willis sent Tom Willis, the defendant, to Alabama as *her agent*, for the negro woman Esther, and as such, he went, and brought, and delivered the negro to her, they should find for the plaintiff."

The Jury found for plaintiff. A new trial was moved—1st. Because the above charge was upon a hypothetical state of facts, not authorized by the evidence.

2d. Because the verdict was contrary to the weight of evidence. The new trial was refused, and this decision is assigned as error.

KENAN, for plaintiff in error.

CAMPBELL; MCKINLEY, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] The only question in this case, requiring more than a moment's consideration, is whether or not there was any evidence which could authorize the charge of the Court to the

Jury, that "if they should believe that his mother got Tom, her son, (the defendant) to go after her negro to Alabama, simply as her agent, with a promise, on her part, to give him the negro at his return, or at her death, then his possession in Alabama and on the way back, was his mother's possession, and did not amount to a delivery, in law; and the gift, or promise to give, was void for want of delivery; and they should find for the plaintiff."

In few words this may be ascertained.

The testimony of Isaac Golden, if credited, showed a positive gift of the slave by Mrs. Willis to her son Thomas. But there was other testimony varying from this—perhaps conflicting—let us see what that proves.

The testimony of Trapp shows that he heard Mrs. Willis say, that she had told Tom, that "if he would go to Alabama for Esther he might have her," and that he went and got her. He also stated, that Mrs. Willis, at the same time, said, "she expected the negro to be Tom's at her death."

Thomas W. Harris swore, that Mrs. Willis died in possession of the slaves in dispute, and he states that, which if it be not contradicted, may be considered as equivalent to a declaration, she had been in possession of these slaves all the time of his acquaintance with her, which was twelve years or more before her death. He further testifies, that he had never heard her say that she had given Esther to Thomas Willis, but that she had given another servant.

Green Jordan testified, that the negroes had been in possession of Mrs. W. for twenty years before her death; that he had heard that Esther had been in Alabama and was brought back by Thomas Willis; but that he had never heard the old lady say anything about the gift, or Tom's claim to the negro.

There was evidence, also, of a gift by deed, from Mrs. Willis to Tom Willis, of one of Esther's children, which he had had recorded in the proper office.

Now let all of these circumstances be considered together. Mrs. Willis had said, that if Thomas Willis would go to Ala-

bama for Esther, he might have her. He went and got her. But the slave presently afterwards is found in the possession of the mother, and, with her children, so continues for many years, even until the death of Mrs. Willis. No evidence, (this is aside from the testimony of Golden, it will be remembered,) of a personal gift or delivery by the mother to the son, of the slave Esther, is given. But it is shown, that she made a solemn gift, by deed, of one of these children to this son, (who had the deed recorded, as if he trusted to it for his title,) and she makes declarations to some of her neighbors inconsistent with the idea that she had given Esther to her son Thomas.

Considering these circumstances as uncontradicted by any other testimony in the case, they certainly authorize a presumption, and that not a weak one, that though Mrs. Willis had said, that if Thomas would go to Alabama for Esther he might have her; yet, that though he had gone for her, she had not kept her promise for some reason, and never had, in fact, given the slave to him. If this were so, he went to Alabama as the agent of his mother, took possession as her agent, and his possession was her possession.

Now this may be contradicted by other testimony in the case, especially, the testimony of Isaac Golden. But it was for the Jury to decide between the conflicting testimony; and it was the duty of the Court to call their attention to both views of the case thus presented. This, we think he did, very ably and fairly, when he made the charge to which exception is taken.

[2.] Though the testimony of Isaac Golden be received as a positive statement, to the effect that Esther had been given, by Mrs. Willis, to the plaintiff in error, and the other facts stated, only authorize a presumption to the contrary; yet, when we look to the character of the conversation testified to by Golden, occuring some twenty years before; and when we reflect that the witnesses were all in the presence of the Jury; that they had the benefit of their demeanor and appearance at the trial, may have had a knowledge of their characters; and thus, by preference, have derived their conclusions from

he presumptive evidence; we are not enabled to say, in the nguage of the Legislature, that "the verdict was decidedly nd strongly against the weight of evidence." We cannot, erefore, authorize a new trial.

No. 5.—ARMISTEAD T. STOKES, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1.] There may be cases of voluntary manslaughter, in which there was no assault made upon the person killing, by the person killed.

2.] "The regular mode of examining into general character, is to inquire of the witnesses whether they have the means of knowing the former witness' general character, and whether, from such knowledge, they would believe him on his oath."

Indictment for murder, in Wilkes Superior Court. Tried efore Judge ANDREWS, September Term, 1854.

Armistead T. Stokes was indicted for the murder of James Henly. On the trial, the following evidence was submitted o the Jury:

WILLIAM C. DENT, sworn: Was present when difficulty appened in this county on 12th February, 1853; was at Stokes' to help raise a house; just before dinner a dispute rose between Mr. Curry and prisoner, when we were raising ouse; no fight, but an offer, when Mr. Henly interfered and revented it. Prisoner then went to his house. Witness and Henly also went to house to dinner. When we got there, ound prisoner lying on the bed. Henly and witness sat down o dinner when several words occurred between prisoner and Henly; about what, witness does not recollect. Henly told risoner if he wanted a thrashing and would go to the road e, Henly, would give it to him. Prisoner and Henly then

started from the house—Henly before and prisoner following him. Witness followed after; when some 8 or 10 steps from the road, prisoner struck Henly. Henly was a few steps in advance of prisoner when they left the house; remained about the same distance apart until the blow was struck; heard no words between them. Witness was some 4 or 5 steps behind them. Prisoner walked behind all the way from the house to where blow was struck; saw the blow struck; prisoner was behind and rather to the right. Henly fell when the blow was given, and was dead as soon as witness reached him; blow was over the right breast, and struck over right shoulder of Henly. Witness did not see the knife when blow was struck; saw a knife that evening said to be the one with which the blow was struck. After Henly fell, prisoner went back to house. Saw Henly make no offer to strike prisoner, while on the way to the road; the road was some 130 or 140 yards from house, and outside of the inclosure where the stabbing took place. Witness was invited by prisoner's boy to house-raising.

Cross-examined: Witness does not recollect what the quarrel between prisoner and Henly in the house was about; witness had no recollection of having words with prisoner in the house; witness had been drinking before dinner; the quarrel occurred soon after we set down to the table; has no recollection of any words that passed between prisoner and Henly, until invitation to go to road. Mrs. Stokes was waiting on table; did not hear her say any thing during quarrel; does not know that quarrel was about Mrs. Stokes. Witness did not know that prisoner and Henly were really angry until they started to the road. There was a gate on the way to the road—road from Mallorysville to Petersburg, about 4 or 5 steps from gate; open space between gate and the road which could be travelled; heard no words when blow was struck. Witness was some 4 or 5 steps behind Stokes when blow was struck, and Stokes followed Henly from house two or three steps behind. Saw blow struck, but saw no knife; both walking on when blow was given. Henly offered no resistance when

blow was struck. After deceased fell, witness went to field, ent a boy over to Mr. Curry's and went, himself, to Andrews. efore they left the house, Henly told Stokes if he (Stokes) anted a thrashing and would go to the road he, Henly, would ve it to him; recollects not a word or syllable said in quarel by Stokes or Henly before the challenge to go to road; ecollects nothing said by Mrs. Stokes. Witness did not tate, on former examination, that Mrs. Stokes put in during he quarrel.

Direct, resumed: Witness heard prisoner and Henly runing on while at dinner, but did not know or believe they ere quarrelling; was common with prisoner to be running n. Gate was about one hundred yards form house; conversation was between all of us, at the new house, about the wagn left by Stokes, when he went off with Judge Barksdale.

SIMPSON CURRY sworn: Witness was employed by prisoner s overseer in the year 1853. Prisoner proposed to build a house or witness. Prisoner told witness, three times, to ask James lenly and George House to assist in raising the house; on he day of house-raising a difficulty occurred between witness nd prisoner, about dividing expenses of liquor for the hands. tokes had a knife and witness had a hand-stick. When witess was in the act of striking prisoner, Henly, the deceased, nterposed and caught witness' arm. Stokes left quick after he difficulty. A short time after Stokes left, the horn blowd and Dent and deceased left for the house; did not see deeased again until after his death. Mr. Dent sent a boy afer him. Witness saw no knife where the body lay; did not emain there but a few minutes. Witness then went to Mr. Villis'. Next saw Mr. Stokes in the yard, while I was out to he road where Henly was dead; some hundred yards from here Henly laid to where Stokes was standing. Witness old deceased's children while passing through the yard, that f Stokes had whipped Henly he could not whip him, witness. y the time witness got to the road, Stokes came out into the ard and said something to witness; witness does not recolect what, and witness hallooed to him, "you have killed this

man." Stokes replied, "I can lay you by the side of him;" and asked witness if he should do it. Saw Mr. Dent after I came back from Mr. Willis'; Dent was not drunk; had not drunk much where witness was, before dinner. When witness told Stokes he, Stokes, had killed Henly, Stokes gave no reason; the wound on the body of Henly was between 2d and 3d rib, on right side; saw no sign of a scuffle where body of Henly lay; ground was such that witness would have seen signs of scuffle if there had been any; the body was lying on the right arm, with one leg lain across the thigh of the other; blood had flown out, and in one place. Witness and Mr. Andrews stopped Stokes in the woods, some 200 yards from house; does not recollect hearing prisoner say any thing about the killing when he was stopped; when he went back to the house prisoner said, I have killed the best friend I have and shall hang for it. Prisoner said he had done it in self-defence. Witness was present at examination of wound; was not close enough to see much.

Cross-examined: When witness went through yard, prisoner was on the bed, and witness thought, asleep. Witness went from the dead man to Mr. Willis', about a quarter of a mile off; found no one there, and came right back to body and found Mr. Andrews, Mr. Willis, Mr. Dent, Geo. House and Ashmore at the body. Witness knew of no cause of difficulty between prisoner and deceased; was at Henly's house on the night of the 24th December, 8 o'clock. Henly told witness he, Henly, had been to Stokes' and had just got home. Witness knew that Mrs. Stokes stayed all night at Henly's once before the killing. Deceased told witness, on the night of the 24th, that he had been to Stokes' to meet witness, who was returning from Augusta. Stokes was gone to Tennessee at the time. Henly was not absent when Mrs. Stokes stayed all night at his house, but left next morning for Augusta. Mrs. Stokes staid at Henly's one day and two nights, and went over the river after she left Henly's, with her brother-in-law; staid some three or four days until prisoner went for her; deceased was a widower and lived about one mile from

Stokes'. Deceased had eight children, and the neighborhood was densely settled.

Direct, resumed: Prisoner and deceased had been friendly previous to killing, and prisoner had frequently invited deceased to his house. It was the day before the house-raising that prisoner told witness to invite Henly over. The house-raising was about half a mile from Stokes' house. Prisoner was drinking, about half and half drunk, on morning of the house-raising; have known prisoner forty years; was always a peaceable man and averse to difficulties; never had heard of any jealousy between prisoner and deceased. Henly was a larger man than prisoner or witness; Henly was sober on the day of the killing, so far as witness knows. Found the body lying on the right arm and one leg across the thigh of the other; deceased had on no coat; did not see any coat on the ground. The body was some 40 steps beyond and outside of the gate.

WILLIAM ANDREWS, sworn: Witness has been acquainted with prisoner since prisoner was ten years old; was also acquainted with deceased; deceased had about 8 children, 3 daughters pretty well grown; saw prisoner on 12th Feb'y, first between 3 and 4 o'clock, P M; was sent for by Mr. Willis; saw Stokes in his own field, going off. Witness, when opposite the house, saw prisoner making towards the river towards Mr. Cade's mill. Witness hallooed to prisoner and told him to go back and stay back; prisoner turned round as though going back, walked a few steps and replied, you are no officer; I will walk where I please. Prisoner left the road and went round through the wood; saw nothing of him for some time; witness went up the hill and prisoner stepped out from the bushes, about 10 or 15 steps in front of witness; prisoner walked up towards witness, within a few steps, with his right hand in his pocket. Witness told prisoner to take his hand out of his pocket, and witness levelled his gun at legs of prisoner; after the order, prisoner kept advancing and raising his foot. Witness told prisoner if he, prisoner, put his foot to the ground he, witness, should shoot. Witness

asked, what possessed you to kill Henly? Prisoner replied, I did kill him, and expect to be hung for it; and if I could kill two or three others I would be perfectly willing to be hung. When witness thought he would have to shoot, he called for Curry to witness it. Witness had been sitting on the root of a tree and prisoner in the road; he, prisoner, got up and walked off. Witness told him, when they got to the forks of the road, he might go 30 or 40 steps, but no further. Prisoner went about 30 steps and stopped, with his back to witness and Curry, then walked back towards us, and I ordered him to keep on the other side of road—if he came close I would lay him out as straight as he had laid out that poor man. Prisoner hung down his head and asked witness to go to the house with him. Witness refused and Curry went; after prisoner had been in house some three quarters of an hour he came out and walked up towards the body of Henly. Witness told him to hold on—he had gone as near as he ought. Prisoner stopped and observed to the crowd, that Henly was a connection and a brother mason, and he would not have killed him for the world, but he had to do it in self-defence. Prisoner walked about a little and said he would give himself up; witness told him not to go to the house, but to set down. Prisoner said Henly had struck him with a stick; there was no stick near the corpse a short time afterwards. Prisoner observed, that Henly had shot at him. Witness asked the prisoner where the pistol was. Prisoner replied, he, Henly, has it about him. Witness then searched deceased and found a common old single bladed knife in his pocket; the knife was shut. On Monday after, prisoner said he was struck with a stick by Henly on the back of the neck; did not ask him on the day when he was struck, as witness saw no stick. Witness asked prisoner to lend him the knife he struck Henly with; witness looked at it and examined it; knife exhibited in Court; witness says it is the same one handed him by Stokes, or out of same paper. When Dent came to me he was about as a man who had taken one drink of liquor or so; should not have known, from his appearance, that he had taken

liquor, if witness had not known it was used at the house-raising.

Cross-examined: Mr. Dent went for witness; was as a man who had taken a drink or so; witness took his gun and went round the fence. Prisoner was in the road, in his own field, when I saw him, about 100 yards from the house; witness went round the fence losing sight of prisoner, and Stokes came out of the woods towards where I was standing in the road. Prisoner seemed to be going down the hollow; witness told him not to come nearer; that he, witness, was going to meet him; the first time witness saw prisoner, after he got round the fence, he was coming out of the bushes and approaching him. Witness first saw the knife in the hands of prisoner when he gave himself up; the knife was asked for and given up; nothing else found on the person of prisoner. At the conversation around the body, witness thinks John Andrews, Billy Cade and others, were present; at conversation, witness asked prisoner where he was hit; prisoner placed his hand on back of his neck and said it was there; prisoner said nothing else, at that time, that witness recollects to have heard; prisoner and deceased were always friendly, when together, but did not talk so of each other when apart; cannot say the exact cause of bad feeling; sometimes Stokes would say something, again another. In a conversation between prisoner and witness, prisoner said that every man who came to his house got his wife. Witness told prisoner to name the man—that it was a lie, for he, witness, had been there several times and he, witness, had not; prisoner named deceased and Sam Hill. Witness replied, I have nothing to do with Hill; but if you know anything, Armstead, against Henly, I want you to name it. Prisoner said Henly had caught his wife by the shoulder and shook her, playing with her. Miss Campbell was present and remarked—Stokes, you know better; it was me whom he took by the shoulder, and was playing with, and not your wife. Prisoner applied to me for room to put his clothes in—that he intended to leave home, for he could not stand the *way they* were carrying on there; that

whenever he said anything they threatened to whip him and abused him; that Sam Hill and others did so; he said nothing there about Henly; witness did not say to Wade Stokes on the road to Augusta, that prisoner had come to him to get board or a room, because Henly and others carried on so at his house that he could not stay there. John Stokes and Oscar Dent were present, in a buggy, about 40 feet from prisoner and myself, during the conversation above. Witness has not subscribed money or employed Counsel to aid in this prosecution; is under no promise to do so; only asked Mr. Stephens and Mr. Thomas why they withdrew from the prosecution, and stated to them that Heard had told me the money was made up.

Dr. JOHN H. WALTON, sworn: Was present at the inquest held over the body of deceased, and assisted in examination; the wound was in the right breast, one and a half inches from sternum, between 2nd and 3d rib; cut through anterior portion of the right lobe of the lungs, then through the pericardium or thin membrane that covers the heart, then cut the aorta about inch and half above the heart—such wound necessarily produced instant death.

Cross-examined: Heart below liver, of which the knife entered above two inches or more.

Direct, resumed: From direction of wound, it could have been inflicted either from behind or from the left of the person receiving it.

Cross, resumed: For such a wound to have been inflicted when the two men were of equal height, it was necessary that the party inflicting it should be on one side to the right; it could not be inflicted by one person standing behind another and striking directly over the shoulder.

EVIDENCE FOR THE PRISONER.

JOHN STOKES, sworn: Is son of the prisoner; was present on the day that Henly and Mr. Dent took dinner at prisoner's house; was in an adjoining room in bed sick; partition

etween; dinner table visible but not bed. Prisoner came to ouse half hour before Henly and Dent came to house; pris- ner and wife were quarrelling. Mr. Henly came in to din- er, and prisoner's wife said, if you know what Stokes has een saying about you, you would give him a thrashing that inute. Mr. Henly then said, Armstead, if you will walk ut into the road, I will give you a thrashing. Henly threw is handkerchief in prisoner's wife's lap, and went out first, risoner next, and Dent next, passing through the room where itness was confined by sickness; saw them no more after- ards.

Cross-examined: The bed in which witness was lying was a such a situation he could see out to the road; did not tell ny one that he saw the difficulty; did not tell Mr. Andrews e; did not tell him, on the Monday after homicide occurred, hat the difficulty occurred about making a coffin lid for Mr. Viseman; did not tell him that prisoner never had cause to e jealous of Mr. Henly; never told Mr. J. Willis so at any- ime.

Direct, resumed: Did not recollect what prisoner said at rst of the quarrel between prisoner and wife, before Henly ame, but heard his wife say her arse was her own, and Hen- y could do it as well as any body. On the night of the mo- ing to Augusta does not recollect hearing prisoner tell Mr. lenly he wished him to keep away from there; but has, at arious other times, heard him tell him so. Has seen Henly nd prisoner's wife go off together, and has stated so to his ather privately.

JOHN ANDREWS, sworn: Never heard deceased say that risoner had forbidden him his house; had heard him say hat prisoner had threatened to kill him, but he was not afraid f his doing it, and was present when prisoner was arrested; eard him say he had killed him and he would do it again, nd that he was sorry for it, but he would kill the best friend e had, under the same circumstances; said Henly struck him ith a stick on the back of his neck; got there about one hour

after Henly's death. Willis, and Dent, and Curry were there, and others; heard nothing about pistol.

Direct: Staid there all the time till prisoner was arrested.

ARCHIBALD N. SAYRE: Some six or eight months before the homicide, on his return from Anthony Shoals Factory, saw Stokes on an island in the river, and on the way from there he told me to tell Henly to keep away from his house, and let his wife alone; if he did not he, prisoner, would kill him; told him if he wanted such messages borne he must bear them himself.

Cross-examined: Stokes was very drunk at the time; saw Stokes and Henly together very frequently about a week afterwards, when Stokes invited Henly, pressingly, to come to his house; inquired why he staid at home so close. Have known prisoner since 1832; very often drunk; hardly ever from under the influence of liquor; never had many fights, though a great hand to get up difficulties, and very abusive, till he saw his abuse about to be resented; never knew him to strike any body. Has heard prisoner, on one occasion after the first conversation, say that his wife was too familiar with other men, and that he was going to quit home on that account; comparatively sober then. Stokes said he left his wife very drunk.

HENRY CAMPBELL: On the night witness and family went to Augusta, camped at Stokes'; Jack Dallas, James Henly, the deceased, and Wm. Dent and George House were there; in November preceding the homicide, thinks on the 12th, heard prisoner tell the people there to go home; saw no one but Henly have liquor there that night; he had a flask; Henly and the others refused to go, and staid till nearly day; saw Mrs. Stokes and Henly standing out in the yard, between midnight and day; has heard Mr. Stokes tell deceased if he did not go away and keep away from his house, and let his business alone, he would kill him. Mr. Stokes was not drinking that night, and had not been at midnight.

Cross-examined: Henly and the others came about twelve o'clock at night; witness left for Augusta on Thursday after

the homicide happened; has been at Mr. Stokes' house once since. Gibson House was present when prisoner told deceased to keep away from his house.

Dr. D. M. ANDREWS does not think such a wound as deceased's could be given directly over the shoulder; thinks the direction of the knife would be horizontal in a wound given between the second and third ribs, to reach aorta an inch and a half above its junction with the heart.

Cross-examined: Thinks, if the prisoner was standing a little behind, to the right, such a wound could be given.

Dr. WALTON, (recalled): Sustains Dr. Andrews.

WM. W. STOKES: On the road to Augusta, Mr. Andrews told the witness that prisoner had been to his house and applied for a room; that he did not want such a set about him; that Stokes had told him he was annoyed by Hill, Henly and others; has known prisoner from a boy; has never known him to offer personal violence to any body. Prisoner has been intemperate from a boy, except a few months.

Cross-examined: Is certain it was Hill, Henly and others that Mr. Andrews told witness, Stokes said were annoying him; conversation took place some months previous to the killing.

N. G. BARKSDALE: Stokes has always been considered a peaceable man; has known him from boyhood; Stokes is about 40; has never known him guilty of any violence.

WM. ANDREWS re-called: Had a conversation with John Stokes, on the Monday after homicide happened; asked him how accident occurred; he said Ma and Pa had been quarrelling ever since Sam Hill was over there, and that cousin James Henly's name was not named—but Mrs. Stokes said, if you knew what Stokes has been saying about you, you would not stand it; Stokes said I have not said a word about him, and if he had said anything about him he would not deny it. Mrs. Stokes said that Stokes had said that Henly charged 2½ dollars for making a coffin for old man Wiseman, who died at Henly's house, and had kept the balance of the money. Henly said it is not so Stokes, and you know it—and if you

will go to the road with me, I will give you a thrashing. Wiseman was sick, and died at Henly's. John Stokes said he heard prisoner say to Henly, if he was going to give him a whipping, he was ready; Henly replied, go to the big road, he would not fight him in his yard. John Stokes said he got up and sat on his bed at the window; Henly went out of the gate—his father behind him, and Dent next. Dent stopped to shut the gate; after getting out of the gate a few steps, he stooped, as if he had dropped something; picked it up; stepped a few steps a little farther, and struck Henly over the right shoulder, and Henly fell; prisoner stooped down afterwards—whether it was to pull the knife out, or to look at the wound, he could not say.

ISAIAH T. WILLIS: Had a conversation with John Stokes on the Sunday after the homicide, when he said he had never seen anything amiss between James Henly and his stepmother.

N. G. BARKSDALE: Is acquainted with the general reputation of Wm. Andrews in the vicinity where he lives; from that reputation, would question it.

WM. CADE: Has been long acquainted with Wm. Andrews; from his knowledge of him, would believe him on his oath.

Cross-examined: Has contributed to this prosecution.

F. E. SMITH: Is acquainted with Wm. Andrews; from his knowledge of his reputation, would believe him on his oath; has contributed to this prosecution.

WM. HOUSE: Knows Wm. Andrews, (knows nothing very bad about his character); have not contributed to this prosecution, but expects to do it; would believe him on his oath in a Court of justice.

When Wm. Andrews was offered to be sworn on behalf of the State, Counsel for prisoner objected to his being introduced as a witness, on the ground that the list of witnesses furnished to the defendant by the Solicitor for the State, included only the two witnesses sworn before the Grand Jury, and Dr. Walton substituted for Dr. Whitlock, who had departed this life; and that no notice of the said Andrews be-

ing expected to be introduced as a witness in this case had ever been given to the defendant or his Counsel.

The Court over-ruled the objection, and Counsel for defendant excepted.

Wm. House, introduced by the State to sustain the character of Wm. Andrews, in answer to the usual question, as to character for truth and veracity, answered, that "he *knows* nothing very bad about his character." Counsel for defendant proposed to ask him, "Have you never *heard* anything very bad against his character."

The Court ruled out the question, because it was not confined to his character for truth and veracity, and defendant excepted.

Afterwards, on motion of the Counsel for the State, the Court struck out the testimony of House, that "he knows nothing very bad about his character." To which decision, defendant's Counsel excepted, because said evidence was legal.

After the defendant had introduced his testimony, the Court charged the Jury as follows:

CHARGE.

"Gentlemen of the Jury—the law having made the Jury the judges of the law, as well as the fact, I would prefer to decline charging you altogether; for it seems inconsistent that I should propound the law when you are at liberty to disregard the Court. Yet, so it is, while it is my duty to give you in charge the law, you are at liberty to abide, or not, by the Court's exposition of the same. The Court, therefore, will say but little to you in the way of charge, as you are judges of the law as well as the fact. I will read to you the law which, I think, most relevant to the case, and read it deliberately. The Court then read to the Jury the following sections of the fourth division of the Penal Code: *two, three, four, six, seven, twelve, thirteen, fourteen, fifteen and sixteen,* and proceeded as follows:

If it is satisfactorily proven to you that the prisoner slew the deceased, Henly, the next inquiry is, has the offence been reduced to an offence lower than murder by the proof? To make the homicide murder, it must have been committed with malice aforethought, express or implied. It is for you to judge, from the evidence, whether there are any circumstances proven to show express malice. If no express malice has been proven, then you may believe and find implied malice. If you are satisfied that the homicide was committed without considerable provocation, and that all the circumstances show a malignant and abandoned heart, you can find that it was instigated by implied malice.

I deem it necessary only to examine whether the offence has been reduced to voluntary manslaughter or to justifiable homicide. The offence could not be reduced to voluntary manslaughter by any provocation of words or threats; there must have been some assault by Henly on the prisoner, or an attempt, by Henly, to commit a serious personal injury on him, to reduce the crime from murder to manslaughter.

The Court is of opinion that jealousy was not a sufficien provocation to reduce the homicide to manslaughter. Upon this subject we must speak in the language of the law, and not from the promptings of our feelings.

To ascertain whether the homicide be justifiable, the Court deems it necessary only to inquire whether it was committed in self-defence? And to make the homicide justifiable on this ground, you should believe that the killing was absolutely necessary to prevent the injury apprehended from the deceased. If you believe the prisoner could have prevented injury to himself by declining to fight with deceased, and that the latter was not the assailant, then the offence is not justifiable homicide. You must bear in mind the distinction between slaying to *prevent* an injury, and slaying in *revenge* of an injury. The former may justify when the latter will not.

The Court is of opinion, that if the prisoner slew the deceased on account of jealousy, the case does not stand upon the footing of reason and justice that will reduce the killing

from murder to justifiable homicide. Neither is the Court of opinion that it is justifiable on account of self-defence, upon the footing of reason and justice, unless the Jury shall be of opinion that the danger to prisoner was so urgent and pressing, at the time of the killing, that, in order to save his, the prisoner's life, the killing of Henly was absolutely necessary.

It was not justifiable to slay deceased from a dread or suspicion that he would commit adultery with prisoner's wife. If he had endeavored to enter the house for that purpose, against the consent of prisoner, he might have been resisted at the sacrifice of his life.

If you find the prisoner guilty of manslaughter you must say whether it is voluntary or involuntary, because the punishment is different.

The Court has been requested, in writing, by prisoner's Counsel, to charge:

"That if the Jury believes, from the evidence, that this case stands upon the same footing of reason and justice as those enumerated in the 4th division of the Penal Code, the homicide is justifiable."

The Court charges the above to be true, with these modifications:

1st. That as regards self-defence, it is provided for under the said 4th division, and is there enumerated and met by what the Court has already charged.

2d. As regards intercourse with prisoner's wife, the Court is of opinion that it would not have been justifiable to slay deceased because of previous or apprehended future adultery; but if deceased had been about to enter the house of prisoner against his consent, to commit adultery or rape, *that* would fall upon the same footing of reason and justice as those cases enumerated in the said 4th division in the Penal Code.

To which charge the defendant's Counsel excepted—

1st. That the Court erred in charging that there must have been some assault, by Henly, on the prisoner, or an attempt,

by Henly, to commit a serious personal injury on him, to reduce the crime from murder to manslaughter.

2d. That the Court erred in charging, "that the Court is of opinion that jealousy was not a sufficient provocation to reduce the homicide to manslaughter—upon this subject we must speak in the language of the law, and not from the promptings of our feelings."

3d. That the Court erred in charging, "I deem it necessary only to examine whether the offence has been reduced to voluntary manslaughter or justifiable homicide;" thereby excluding from the Jury the question as to involuntary manslaughter, and expressing, thereby, an opinion on the evidence.

4th. That the Court erred in charging, that "to ascertain whether the homicide be justifiable, the Court deems it necessary *only to inquire whether it was committed in self-defence.*"

5th. That the Court erred in charging, "that slaying in revenge of an injury cannot, in any event, justify a homicide."

6th. The Court erred in charging, that if the deceased was not the assailant, "then the offence is not justifiable homicide."

7th. Because the Court erred in charging, that "neither is the Court of opinion that it is justifiable on account of self-defence, upon the footing of reason and justice, unless the Jury should be of opinion that the danger to prisoner was so urgent and pressing at the time of the killing, that in order to save his, the prisoner's life, the killing of Henly was absolutely necessary.

8th. That the Court erred in charging, "that it was not justifiable to slay deceased from a dread or suspicion that he would commit adultery with prisoner's wife—if he had endeavored to enter the house for that purpose, against the consent of prisoner, he might have been resisted at the sacrifice of life."

And to which refusal to charge, in the words requested by

defendant's Counsel, and to the charge as given, Counsel for defendant excepted, on the following grounds:

1st. Because the Court erred in not giving the charge requested, without modifications.

2d. Because the modifications of law, as given by the Court, were illegal.

3d. Because the Court erred in charging that the request of prisoner was true, with these modifications: First, That as regarded self-defence, it is provided for under said fourth division, and is there enumerated and met by what the Court has already charged. Secondly, As regards intercourse with prisoner's wife, the Court is of opinion that it would not have been justifiable to slay deceased because of previous or apprehended future adultery; but if deceased had been about to enter the house of prisoner against his consent, to commit adultery or rape, *that* would fall upon the same footing of reason and justice as those cases enumerated in the fourth division of the Penal Code.

The Jury then retired and found a verdict of "guilty."

A new trial was moved, on the ground that the verdict was contrary to the law and evidence; and also, on the several alleged errors excepted to as above.

The Court refused a new trial, and defendant's Counsel excepted.

On these several exceptions, error has been assigned.

TOOMBS; T. R. R. COBB, for plaintiff in error.

SOL. GEN'L WEEMS; BARNETT, for the State.

By the Court.—BENNING J. delivering the opinion.

A part of the charge of the Court complained of, was as follows: "There must have been some assault by Henly on the prisoner, or an attempt by Henly to commit a serious personal injury on him, to reduce the crime from murder to

manslaughter." According to this, no case of homicide can be a case of manslaughter, unless it be one in which the person killing was first assaulted by the person killed. According to this, therefore, if, in a sudden fight, without weapons, and one entered into with equal willingness by both parties, the party who happens to give the first blow kill the other; or, if a husband, taking a man in the act of adultery with his wife instantly kill him, the homicide cannot be manslaughter, but must be murder.

Is this law?

If it is, it must be for the reason that it is made law by the seventh section of the fourth division of the Penal Code, which is in these words: "In all cases of voluntary manslaughter, there must be some actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing. Provocation by words, threats, menaces or contemptuous gestures, shall in no case be sufficient to free the person killing from the guilt and crime of murder. The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible; for if there should appear to have been an interval between the assault or provocation given, and the homicide, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and punished as murder."

Does this section make the charge law, and put the cases aforesaid out of the class manslaughter into the class murder?

If it puts those cases out of the class manslaughter, it must, of necessity, put them either into the class murder or into the class justifiable homicide; for there can be no case of homicide which does not fall into one or another of these three classes. "Homicide is the killing of a human being of any age or sex, and is of three kinds: murder, manslaughter and justifiable homicide." (*Code.*) According to the Court below, the section puts them into the class murder.

But that class will not receive them unless forced to do it, for they are cases unaccompanied by malice; and malice is

the distinguishing mark of all cases of homicide that are murder. They are cases in which is wanting a "deliberate intention" to take life—such a "deliberate intention" as "is manifested by external circumstances capable of proof." Therefore, they are cases free from *express* malice. They are cases, in respect to neither of which can it be said that it is a case "where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart." Therefore, they are cases free from *implied* malice. (*Code, 4th Div.*)

These cases, therefore, cannot be got into the class murder, without the doing of great violence to the definition of murder.

Neither can they be got into the class justifiable homicide, without the doing of equally great violence to the law defining or designating justifiable homicide.

What then? Shall we exclude these cases from every one of the three classes of homicide? That cannot be, for the law says that every case of homicide is to be included in some one of these classes.

In some one of the above classes, then, we have to include the cases. Which shall it be? Manifestly, that class into which the cases will go most easily—will go by the use of least force. And that one is manslaughter. The *definition* of manslaughter is such, that if it stood alone, the class manslaughter would receive them readily—without having in the least to be forced. "Manslaughter is the unlawful killing of a human creature without malice, either express or implied, and without any mixture of deliberation whatever." (*Code, 4th Div.*) This is not true of the definition of murder, or the definitions of justifiable homicide. To make the definitions of those two classes of homicide such that they would receive these cases, would be to so change them as to destroy their characteristics. It is true, the definition of manslaughter does not stand alone. It is accompanied by the said seventh section, which declares, that "In all cases of voluntary manslaughter, there must be some actual assault upon the person killing," &c. But it re-

quires a less degree of force to let the definition control this section than to let this section control the definition; for if we let the section control the definition, we have also to let it control another definition—that of murder; and so to control that definition as to make it say, that there may be cases of murder without malice.

[1.] The result is, that these cases have to be considered, not cases of murder, but cases of voluntary manslaughter. And if that be true of these cases, then it may be laid down as a rule, that no case of homicide can be a case of murder, if it is not accompanied by malice, either express or implied; and that every case of homicide not so accompanied, is, notwithstanding the said seventh section, a case of manslaughter, unless it be a case of justifiable homicide.

Is that section, then, to have no effect? By no means. It is to be used to help us arrive at what is malice—*implied* malice. "Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart." And that section says: "Provocation by words, threats, menaces or contemptuous gestures, shall, in no case, be sufficient to free the person killing from the guilt and crime of murder." This is as much as to say, that provocation by "words," &c. is not "*considerable* provocation"; and that if life be taken in consequence of such provocation, it will be taken under circumstances which will "show an *abandoned* and *malignant heart*." In short, it is as much as to say, that notwithstanding any provocation by "words," &c. malice shall be implied.

I incline, very much, to think that the true meaning of this seventh section is this, viz: in all cases of homicide, in which the provocation is but "words," &c. the offence shall not be reduced from murder to manslaughter; in all cases of homicide, where the provocation is "some actual assault," the offence may be reduced from murder to manslaughter, if there is not a sufficient cooling time between the assault and the killing. This, I incline to think, is the true meaning and the whole meaning. I cannot think the section was intended to

affect cases, in which the provocation was neither "words," &c. nor "some actual assault,"—was intended to affect the case, for example, of the man whose provocation is an act of adultery with his wife, committed under his own eyes. (4 *Black. Com.* 192.)

If what has been said is true, it follows that the Court below, in charging the Jury that "There must have been some assault by Henly on the prisoner, or an attempt, by Henly, to commit a serious personal injury on him, to reduce the crime from murder to manslaughter," stated the rule too broadly, and that the Court should rather have charged the Jury, that although there might have been no assault committed by Henly on Stokes; yet, if Stokes had other and very great provocation from Henly, such provocation as that which a man has who takes another in the act of adultery with his wife; and if all the circumstances of the killing showed that he acted from a sudden, violent heat of passion, occasioned by such provocation, and not from the promptings of an abandoned and malignant heart, of all which they must judge from the evidence, then the homicide would be no more than manslaughter.

The Court held, that to impeach a witness on the score of character or reputation, it is necessary that the examination be confined to his "character for truth and veracity."

[2.] In *Phillips on Evidence*, 1, 292, it is said that "The regular mode of examining into general character, is to inquire of the witnesses whether they have the means of knowing the former witness's general character: and whether, from such knowledge, they would believe him on his oath?" With Phillips agree Starkie, (*Stark. Ev.* 182,) Greenleaf, (*Green. Ev. Sec.* 461,) and Cowen & Hill (*Cow. & Hill's Notes to Phill. Ev. note* 531,) as also does the case of *Rex. vs. Bispham*, (4 *Carr. & P.* 392.)

We think that the weight of authority is with Phillips; and therefore, that the rule, as laid down by the Court, is too narrow.

Wherefore, it seems to us, that under the New Trial Act of 1854, a new trial ought to be granted.

No. 6.—CHARLES C. BEALL *et al.* plaintiffs in error, *vs.* A. E. COCHRAN, administrator, &c. defendant in error.

[1.] A suit was brought against the Sheriff and his two sureties, on his official bond. On the first trial, judgment was recovered against all three. The Sheriff appealed under the Act of 1839, the sureties neglecting or refusing to do so. On the final trial, the Sheriff was acquitted from any liability on account of his alleged misconduct: *Held*, that the first judgment could not be enforced against the sureties.

Illegality, in Wilkinson Superior Court. Decision by Judge HARDEMAN, October Term, 1854.

Suit was brought by A. E. Cochran, as administrator, &c. against Solomon B. Murphey, Sheriff, and the sureties on his bond, on an alleged misfeasance, in demanding and taking more costs than the law allowed. On the first trial, there was a recovery by the plaintiff below. Murphey, the principal, alone appealed. Upon the appeal trial, a verdict was rendered in his favor; execution was issued on the first verdict, and judgment against the sureties, who had not appealed. An affidavit of illegality was filed, on the ground that the sureties were relieved by the final judgment relieving their principal. The Court below dismissed the illegality, and this decision is assigned as error.

JNO. C. BOWER, for plaintiff in error.

A. E. COCHRAN, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Ought the sureties to pay the money recovered on the first judgment? and because of that judgment? To state the case free from all embarrassment growing out of the Act of 1839, (*Cobb's Dig.* 500,) authorizing *one* of several parties, plaintiff or defendant, to appeal, and which urgently demands legislative explanation and amendment, as was made manifest in *Stell vs. Glass*, (1 *Kelly*, 475); and *Allison vs. Chaffin and another*, (8 *Ga. R.* 330,) and other decisions of this Court—suppose the suit had been brought separately in this case, against the Sheriff and each of the sureites—and this could have been done, the bond being joint and *several*—and suppose judgments had been recovered against each of the sureties on account of the alleged misconduct of the principal; and then, on the trial against the Sheriff, he should have been acquitted of all delinquency—is it possible that Equity would not relieve the sureties by injunction, against the payment of the judgments against them? If it would not, there would, unquestionably, be a most signal and lamentable failure of justice in such a case. Sureties made to respond for the default of their principal, of which he was never guilty! They mulcted, perhaps, in the entire penalty of the bond, and he discharged from all liability, leaving them, of course, without the right of recourse over against their principal for contribution!

It is said Courts make precedents. We disclaim all such pretension. It is nevertheless true, that all precedents had a beginning; and if none can be found for this case, it is because, under our peculiar Statutes regulating the relation of principal and surety, and the rights of the latter, resulting from that relationship, *after* as well as *before* judgment, the case, itself, is one *sui generis*.

Whether the Act of 1799 authorized a suit against the sureties on a Sheriff's bond, for any default or misconduct in his office, *anterior* to a recovery against the principal, I will

not discuss. Certain it is, that no action can be brought until an order be passed for that purpose, on the application of the party aggrieved. The showing for this purpose, if not required to be made on affidavit, should be more special than it has been. It would save much trouble and expense to sureties—it might have prevented this case.

No. 7.—JEMIMA HALL, caveator, &c. plaintiff in error, *vs.* SARAH HALL, defendant in error.

[1.] By the words *credible* witnesses, in the Statute of Frauds, *competent* witnesses are to be understood; and a will may be pronounced for, though the attesting witnesses depose to the incapacity of the deceased.

[2.] When explaining the sense in which the term *credible witnesses* is to be understood, it is not error in the Court, by way of illustration, to say that the will may be set up by other witnesses, because the subscribing witnesses "may swear falsely, or may believe more capacity required than is necessary."

[3.] When it appears by the certificate of the subscribing witnesses, and by their evidence on oath, that a will was attested in the presence of the testator, this is *prima facie* evidence of the fact, and should be held sufficient, unless controverted by definite evidence.

[4.] A testator has testamentary capacity, though in a sinking and dying state, if, when his attention is aroused to the making of his will, his mind acts definitely, and with discriminating judgment; if he knows the contents of what is written as his will, comprehends his relations to his family and connexions, theirs to him, the nature of his estate, and disposes of the same with understanding and reason.

Caveat on appeal, in Hancock Superior Court. Tried before Judge ANDREWS, October Term, 1854.

This was a question of *devisavit vel non*, upon a paper propounded as the will of Daniel Hall, deceased. The *first* clause gave his wife one half of his real estate; the *second*

gave his cousin Samuel Hall $1.000; the *third* provided that what he gave his wife was during her life, and at her death, to dispose of as she pleased. The next item—"I leave the other part; that is, the remainder, to be equally divided among my nearest relatives." The next was an attestation clause. Then follows, "I mean to be understood my real and personal estate both included in the above disposition of my property; that is, all I possess, in any wise, after the payment of my just debts. I mean by the term I have used above, to-wit: my nearest relatives—my nearest blood relatives. The last item appointed executors. Attested by J. Stone, Hezekiah Rogers and R. F. Green.

On the trial, J. STONE testified, that he was the attending physician, and witnessed the will, about 24 hours before his death. He was importuned by Sarah Hall to go and ask him if he did not want to make a will. Witness asked him, and he said nothing, but appeared careless and indifferent. Then spoke to him of the shortness and uncertainty of life, and told him, if he wanted to make a will, he was ready to write it. After a while he said he had been thinking of making one. I (witness) asked what he wanted written. He said he wanted his wife to have half of his real estate. After I wrote this he went to sleep, apparently in a comitose state. After much difficulty, he said he wanted $1.000 left to his namesake, Samuel Hall. When that was written, he dropped into the same state of stupor. Then said, he wanted his two sisters to have the balance. After the will was written, Sarah Hall requested me to go and ask what he meant by the term real estate. He was in the same state of stupor, and made no answer. I told him it did not comprehend negroes. I asked him again. He still made no answer. He seemed to be trying to understand. I asked him if half of all his estate was what he meant? He answered, "yes, that's what I mean." He seemed, when aroused, to be in his proper mind. I wrote it as he directed, and made the correction as he di-

rected. Known patients, in comitose state, to be in their right mind when aroused. Sarah Hall was rubbing his head, apparently, to keep him awake, when I asked the first question. She said, "Sammy make your will as you please. Do you want your property you give to your wife to go to your folks or her's at her death? Would you not rather it should go to your folks?" He said, "she has helped me to make the property and save it, and I want her to have one half." She asked him again, and he did not answer. I asked, then, do you want the property, after her death, to go to your folks, or do you want her to do as she pleases? He said, "That's what I want." She asked him to let her portion include a certain negro. He said "No—let them all go together." I understood her to mean that it should be a component part of her share. There were no other attempts to influence him. His disease was a slow typhoid fever. In the last stages, patients sleep a great deal. Did not converse a great deal with him. No one suggested the name of his cousin. When aroused, he did not use an idle word. His answers to questions were seemingly rational. To test his capacity, I asked him how long he had been sick? He studied some time and replied, four weeks next Friday. This was right. I read the will to him as I wrote it, by item, but I did not read it over to him as a whole. As I read it, he seemed tacitly to admit it. I do not remember his saying so.

Cross-examination: I was sitting in the parlor when Sarah Hall came to me and said—as Mrs. Hall (the wife) is out, go and see him and try to get him to make a will, if he is not too far gone. She importuned me. I saw no undutiful conduct on the part of his wife. He was sinking, and I was stimulating him with brandy and laudanum. He would never have thought of making a will, probably, had I not suggested it. I do not consider him of sound mind and disposing memory, in the fullest extent of that term. When we ceased putting questions to him he ceased, apparently, to care anything about it. I doubt whether he would have any recollection of the will, had he gotten well. I am not certain

but that when he signed his name, after making the "H" he stopped till he was told the next letter. Doubted whether, in his *palmiest* days, he knew the meaning of *real estate*. When he signed his name, made some observation about its being badly done.

HEZEKIAH ROGERS, another subscribing witness, thought his mind very weak; did not think he was of sufficient mind to make a will. Did not hear the will read, nor hear him say a word at that time; was his overseer; asked him what must be done? Said, "Tell the negroes to wash their faces and hands and go to grubbing the field." We wanted some grubbing done.

R. F. GREEN, the other subscribing witness, did not think him of sufficient mind to make a will. He is the nephew of Mrs. Hall, and lives with her still, and does not know whether she will charge him board.

ANNA DEVEREAUX: Heard Mrs. Hall, a few hours before the will was written, say that Mr. Hall was better, that he had been in his senses all the time of his sickness. Testator knew her and spoke to her; when she went in, several neighbors came in and he knew them also. He looked like a dying man—very weak; directed that three witnesses and a Justice of the Peace be sent for, before he signed the will; thought him to be in his sound mind.

MATILDA HALL: Saw testator the day he made his will; thinks he was of sound and disposing mind; knew every one and spoke rationally; heard him tell Dr. Stone that the will was right; she is mother of one of the legatees.

WILLIAM HALL: Present when the will was made; thought him of sound mind; he knew and spoke to witness. Dr. Stone asked him who he wanted as executors? He said his sisters Nancy and Sally. Dr. Stone told him he ought to have a man. He then called witness and asked him if he would be executor. He is father of Samuel H. Hall, a legatee.

E. W. BROWN: Samuel Hall got no property by his wife; he got several negroes from his father. The Court charged

the Jury, among other things, "that the word *credible* witnesses used in the Statute of Frauds, does not mean that all the witnesses are to be believed; but that they are not to be idiots or lunatics, or persons convicted of crime." This charge is assigned as error.

Also, "That a will may be proven and will be valid, though the witness may swear to the incapacity of the testator; that the witnesses may swear falsely, or they may believe more capacity is required than the law holds to be necessary; but if sufficiently proven by other evidence, the will will be set up."

This charge is assigned as error.

A motion was made for a new trial on the ground, among others, that the verdict was against the law and the evidence. The motion was refused, and this is assigned as error.

Other exceptions were filed, but abandoned in this Court.

KENAN; R. M. JOHNSTON, for plaintiff.

L. STEPHENS, for defendant.

By the Court.—STARNES, J. delivering the opinion.

[1.] The meaning of the Statute of Frauds, in requiring a will to be attested by three or more *credible witnesses*, according to the charge of the Court below, was not that the same was to be established only by these witnesses, and could not be set up by other testimony, but was, that the witnesses were not to be idiots, lunatics or persons convicted of crime. If this construction be taken in connection with the context, with the whole case, it is not erroneous. The language used in confining the exception to "idiots, lunatics or persons convicted of crime," may have been too restricted; but it was plainly employed by way of illustration. The meaning clearly was, that the word *credible* was used in the sense of *competent*; that the will might be proven, therefore, by testimo-

ny opposed to that of the subscribing witnesses. In this sense, we think the Jury must have understood the charge; and in this sense, it was correct.

We know that there has been some dispute upon this subject; but the better opinion is as we state it.

"A will may be pronounced for though both the attesting witnesses depose to the incapacity of the deceased." *LeBreton vs. Fletcher*, (2 *Hagg.* 558.)

"By *credible* witnesses in the Statute of Frauds, *competent* witnesses are to be understood." *Amory vs. Fellows*, (6 *Mass.* 219.)

[2.] Exception is also taken to the following charge of the Court: "A will may be proven and will be valid though the witnesses may swear to the incapacity of the testator. The witnesses may swear falsely, or they may believe more capacity to be required than the law holds to be necessary. But if sufficiently proven by the evidence, the will should be set up."

It was urged that the Court here put emphasis upon the fact, that the subscribing witnesses might swear falsely, and said nothing as to the possibility of the other witnesses swearing falsely—thus unfairly leaving the Jury to infer that the attesting witnesses in this case had sworn falsely.

It is, to our minds, very plain, that the Court used these words also in illustration. Besides, the proposition was put in the alternative. The witnesses "may swear falsely" he said, or they "may believe more capacity required than the law holds to be necessary." And he referred to these as things, one of which might exist, as a reason why the will should be pronounced for, though the attesting witnesses had sworn to the incapacity of the testator.

We see nothing unfair or improper in the charge, as it is thus presented by the record.

[3.] It was argued, that the Court also erred in not granting a new trial, because the verdict was contrary to evidence, in this: that there was no *legal* presence of the testator, at the time the will was attested by the witnesses; inasmuch as

(it was insisted) he had relapsed into insensibility before the same was signed by them.

This point was not made in the proceedings before the Court below, and does not appear in the assignment of errors. Regularly, therefore, it ought not to be urged before us. But we will deal with it more closely.

The *prima facie* proof is, that this instrument was legally signed by the witnesses in the presence of the testator; for the attesting witnesses so certify by their attestation, and so swear in the evidence which they have given. If this is negatived, it should be by clear and definite contradiction. This does not appear in the record; but resort is had to vague and indirect inference. In consideration of the testimony, as it is presented by the record, the only legitimate inference therefrom, in our opinion, is, that the attestation and signing of the witnesses occurred when the testator had been aroused to consciousness for the purpose of having his will executed.

[4.] We see nothing in the evidence to authorize the conclusion, that the will was obtained by improper importunity, or that the testator was not of disposing mind and memory. Nor can we agree, that what he said on the occasion "sounds in folly." That which may appear unreasonable is susceptible of explanation; and taking all the circumstances into consideration, we think the Jury did what was right in sustaining the will.

Though very ill—though in a sinking and dying condition, yet, it appears to us that what time his attention was aroused and given to the purpose of making his will, his mind acted definitely, and with discriminating judgment. It is clear, that he knew the contents of what was written as his will by Dr. Stone; he showed by what he said and directed, that he comprehended his relative situation to his family and connexions, their relations to him and claims upon him; that before the will was finally executed, his mind acted upon and understood the nature of the estate he was conveying, and that he disposed of the same with understanding and with reason. These are decisive tests of sufficient testamentary capacity.

(6 *Co.* 23, *a.* 4 *Burn. E. L.* 49. *Herbert vs. Lowns*, 1 *Ch. R.* 24. *Right vs. Price*, 1 *Doug.* 241. *March vs. Tyrrell & Harding*, 84. *Terry vs. Buffington and another*, 11 *Ga.* 337.)

Let the judgment be affirmed.

No. 8.—JAMES H. REYNOLDS *et al.* plaintiffs in error, *vs.* JAMES LOFTON *et al.* Justices of the Inferior Court, &c. defendants in error.

[1.] The Justices of the Inferior Courts of the several counties, have no power, under the Act of 1821, to levy, for county purposes, "a tax extraordinary of the general State tax," until after such a tax has been recommended by two-thirds of the Grand Jury of their counties respectively; and if, before such recommendation, any bond be taken by such Justices from the Tax Collector, for the due collection of the tax, the bond is void, as are also any legal proceedings founded on the bond.

Illegality, in Elbert Superior Court. Decided by Judge ANDREWS, September Term, 1854.

The Justices of the Inferior Court of Elbert County issued an execution against the Tax Collector and his sureties, on a bond given for the collection and payment of the county tax for the year 1846. An affidavit of illegality was filed on various grounds—and among others, on the ground that the tax levied was for 62½ per cent. upon the State tax, when the Statute of 1821 limited the tax to 50 per cent.; and that the levy was made by the Court without the previous recommendation of the Grand Jury, as required by that Act. The Court below held the Collector and his sureties liable, in this proceeding, for the tax, up to the amount of 50 per cent. and

for all the extra 12½ per cent. actually collected. This decision is assigned as error.

Various other exceptions were filed, not considered and determined by the Supreme Court.

VANDUZER; TOOMBS, for plaintiff in error.

T. W. THOMAS; T. R. R. COBB, for defendant.

By the Court.—BENNING, J. delivering the opinion.

[1.] Did the Justices of the Inferior Court have power to levy this tax, in the absence of a recommendation of the tax by two-thirds of the Grand Jury?

The first and second sections of the Act of 1821, "to authorize the Justices of the Inferior Court of the several counties in this State to levy extraordinary taxes for county purposes," are as follows:

"From and after the passing of this Act, the Justices of the Inferior Court of the respective counties in this State, or any three of the Bench of Justices of the said Court, in any county, shall have power, whenever in their opinion the exigencies of their respective counties may so require, to levy upon the inhabitants of any county in which the said Justices may reside, a tax extraordinary of the general State tax, and shall be authorized to have the same collected by the Tax Collector, for any county in which such tax may be levied by them: *Provided*, that nothing herein contained shall be construed to authorize the Justices, as aforesaid, to order any levy which shall exceed fifty per centum on the general State tax annually."

"Sec. 2. No extraordinary tax shall be levied and collected by the Inferior Courts, as by this Act contemplated, unless two-thirds of the Grand Jury of the county shall first recommend the same at a regular term of the Superior Court."

The tax in this case was "a tax extraordinary of the general State tax." If, therefore, the Justices had power to levy it, that power must have been derived from this Act, for there exists no other Act from which it could be derived. The Act of 1834, (*Pamphlet*, 234,)is for building a jail; and therefore, that Act, even if not by this time *functus officio*, is not an Act from which the power could be derived.

And, in the opinion of this Court, the power could not be derived from this Act. In the opinion of this Court, the recommendation of a tax by two-thirds of the Grand Jury must *first* be made before the power in the Justices of the Inferior to levy the tax *can exist*. The Court cannot see how to put on the Act a construction that would justify any other opinion.

And if the Justices had no power to levy the tax, it follows, of necessity, that any attempt to levy it was illegal and void. Any judgment rendered by a Court not having power to render it, is void for all purposes. (11 *Ga. R.* 455.) And if the Sheriff execute such a judgment, he is a trespasser. Case of the *Marshalsea*, (10 *R.* 76.) *Brown vs. Compton*, (8 *T. R.* 424.)

It follows, in this case, that the bond was void; and if the bond was void, then all the proceedings on the bond were also void.

The opinion of the Court being, on this question of power in the Justices such as it is, renders it unnecessary to notice the other points in the case.

There ought to be a new trial.

No. 9.—SAMUEL LINDSEY *et al.* plaintiffs in error, *vs.* ALEXANDER D. HUNTER, defendant in error.

[1.] The withdrawal of the debtor's schedule from the Clerk's office, by the Attorney, immediately after it is filed, and its detention in his custody until the sitting of the Court to which it is returnable, may be a good ground for continuing the cause; it is not sufficient to authorize the imprisonment of the debtor, no fraudulent intent being imputed to the parties.

[2.] A schedule, with the oath of the insolvent debtor appended, "that he has no property or effects, of any kind whatever, except as excepted in the oath prescribed by law for insolvent debtors," is sufficient.

Mandamus. Elbert Superior Court, September Term, 1854. Decision by Judge ANDREWS.

Alexander D. Hunter being arrested on a *ca. sa.* gave bond for his appearance at the next term of the Inferior Court of Elbert County, for the purpose of taking the benefit of the Honest Debtors' Act. Twenty days before Court Hunter filed in the Clerk's office a schedule, as follows: "The defendant has no property or effects of any kind, except as excepted in the oath prescribed by law for insolvent debtors." The day after this schedule was filed, the Attorney for Hunter, by consent of the Clerk, took it out of the office and retained it until Court. No application was made by the Counsel for creditors in the meanwhile, for an inspection of the schedule. At the trial, a motion was made to commit Hunter—1st. Because the schedule was never filed. 2d. Because this was not a proper and sufficient schedule. This motion was refused, and a mandamus was sought to compel the Inferior Court to commit. The refusal of this mandamus is the error assigned. Other objections were made, not considered by this Court.

VANDUZER, for plaintiffs in error.

T. W. THOMAS, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

Two questions only need be considered in this case: 1st. Whether the schedule was *filed* in terms of the law? and 2dly. Whether the schedule was sufficient?

[1.] The objection to the filing is, that it was not suffered to remain in the Clerk's office, but was withdrawn by the Attorney of the debtor, and withheld until the sitting of the Court to which it was made returnable. No fraudulent intent is imputed to the parties; no application was made for the paper, either at the Clerk's office or to the Counsel. If the schedule, when produced, operated as a surprise, it would have been good ground for continuing the cause, but certainly not for imprisoning the debtor. In fact, the cause was continued, so that no possible injury could have resulted to the creditor from the failure to leave the schedule in the Clerk's office.

[2.] How stands the matter upon the other ground, namely: the insufficiency of the schedule? The defendant swore that he had no property or effects of any kind, except as excepted in the oath prescribed by law for insolvent debtors. There is but one oath prescribed, by law, for insolvent debtors; that will be found in the Act of 1801, (*Cobb's Dig.* 380,) and in it the debtor swears that he is not possessed of any real or personal estate whatsoever, except his wearing apparel, bedding for himself and family, and the working tools or implements of his trade or calling, together with the equipments of a militia soldier.

Could the schedule have been more definite? Could not perjury have been assigned on the oath appended to this schedule? And if the creditor could have shown that the debtor was possessed of any other effects than those mentioned in the oath, would not a conviction have been inevitable? Was there any thing to prevent the creditors from suggesting fraud or concealment of any property? And

could not an issue have been formed and tried by a Jury upon this schedule?

To our minds, the case is clear; and with the 7th section of the 4th article of the Constitution of the State before our eyes, that "the person of a debtor, where there is not a strong presumption of fraud, shall not be detained in prison after delivering, *bona fide*, all his estate, real and personal, for the use of his creditors," we cannot consent to see a citizen deprived of his liberty, upon a mere verbal quibble.

No. 10.—WILLIAM H. HAWKS, plaintiff in error, *vs.* MAT. J. PATTON, defendant in error.

[1.] In cases of libel and slander, an exception is sometimes made to the general rule, that witnesses must state facts, and not their inferences from them; and as the slander and damage consist in the apprehension of the hearers, they are allowed to give their *understanding* of the words published or spoken.

[2.] If, in a case for words, the pleader adopt the form suggested by the Act of 1847, he must follow that form without material variation, so far as it goes; but the words set forth may be accompanied by such explanatory allegations or inuendoes, as serve to state the cause of action distinctly.

Case for words, in Oglethorpe Superior Court. Tried before Judge ANDREWS, October Term, 1854.

This was an action brought by Patton against Hawks, for slander, under the Statutory form, upon the following words "Matthew J. Patton forged a promissory note on Isaac Sterling, and traded it to me." Upon the trial, plaintiff proved by a witness that "he heard Hawks say to Everett, Gooldsby is no worse than some of his kin, (referring to plaintiff. Patton sold him a note on Isaac Storling, and that he presented it and the maker denied it; that he spoke to Patton about it, and he was going to carry it to Mr. Peeples to see if it was a good note. Hawks said he "believed it was a forged note." Counsel for plaintiff proposed to ask the wit-

ness what he *understood* Hawks to mean? Defendant's Counsel objected, the Court permitted the witness to answer, and this decision is assigned as error.

The Court charged the Jury, that the words proved could not sustain the declaration, because the action was for words actionable *per se*. and the words proved are not.

Counsel for plaintiff then moved to amend, by adding another count, in the Common Law form, upon the words proven, alleging a colloquium, &c. The Court allowed the amendment, and this decision is also assigned as error.

T. R. R. COBB, for plaintiff in error.

T. W. THOMAS, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] The general rule is well settled, that a witness must state facts, and not his inferences from them. And where conversations to which he has listened are proper evidence, he must state the words used, as near as he can recollect them, and leave the Court and Jury to determine the accurate meaning and signification of these words unless, indeed, they be technical words, or terms of art. But in cases of libel and slander, something of an exception seems to have been made to this rule; and as the injury done depends upon the effect which the words have produced in the minds of the hearers, it has been held, that we can ascertain this effect only by finding what was their understanding of the words used. If nothing injurious to the character of the plaintiff was understood to have been said, of course no damage to him had resulted.

This is said to be the reason for the rule. It is, perhaps, a very good reason; for whatever may have been the understanding of the witnesses as to the meaning of the words used, no harm can come to the defendant, unless it be proven to the satisfaction of the Jury, that the words were used maliciously; that is to say, that the defendant *intended*, by the

use of these words, wrongfully to impute the crime in question to the plaintiff.

We find the rule to which reference is made laid down in the early case of *Fleetwood vs. Curly*, (*Hob.* 267,) where it is said, that "where words have two meanings, and the hearers understood them in an actionable sense, the action is maintainable, for the slander and damage consist in the apprehension of the hearers."

In *Burton vs. Haywood*, (8 *Mod.* 24,) the Court says, that in cases of action for words, "we are to understand words in the same sense as the hearers understood them; but when words stand indifferent, and admit of two interpretations, we ought to construe them *in mitiori sensu*," &c.

In the case of *Rex vs. Horne*, (1 *Cowp.* 687,) the Court of K. B. held, that "As the crime of a libel consists in conveying and impressing injurious reflections upon the mind of the subject; if the writing is so understood by all who read it, *the injury is done* by the publication of these injurious reflections, before the matter comes to the Jury," &c. See, also, *Dubost vs. Beresford*, (2 *Camp.* 512. 2 *Stark. Ev*, 461.)

According to this rule, the Court properly admitted the testimony of James G. Thomas.

[2.] After the case was submitted to the Jury, the Court instructed that body, that the words proven would not sustain the declaration. The Counsel for plaintiff then moved an amendment, which was allowed by the Court; and this is assigned as error.

The action had been framed according to the new forms in the Act of 1847. The amendment proposed to strike out the words alleged in the original declaration, and insert what is equivalent to a *colloquium*, (other words varying in terms, though amounting very much to the same in import, as those originally set forth,) together with appropriate *inuendoes*. It was objected that this could not be done; that it was allowing a new cause of action, and that such an amendment could not properly be made to the Statutory form adopted.

It is our opinion, that the matter of this amendment did

not present a new cause of action. It plainly refers to the same conversation alluded to in the original petition, varies the terms in which the words are stated, but by a colloquium and inuendoes, sets forth that which, being very much the same in import, was obviously the same transaction. It was, therefore, a legitimate subject-matter for an amendment.

We are also of the opinion, that the Statutory form might, in this way, be amended. And we do not agree with the suggestion, that the Legislature intended that this form should be appropriate to such words only as were of a slanderous signification, without the aid of a colloquium and inuendoes. We think that the Legislature intended to do what was reasonable and sensible, in furnishing these forms. We desire, in this spirit, to construe the Act and give effect to it; and we believe that it may be thus made quite useful.

So far as the form goes, it must be followed; and there must be no material variation from it. But when the blanks which it contemplates are to be filled, they may be supplied with such appropriate matter, as falling within the scope of the Statutory direction, is yet fit and proper to set forth the cause of action plainly and distinctly.

The form which this Statute prescribes for the action of slander, is as follows: "The petition of A B showeth, that C D of said county has damaged your petitioner in the sum of dollars, by falsely and maliciously saying of and concerning your petitioner, on the day of the following false and malicious words:" Here following, the Statute directs the alleged slanderous words to be inserted.

Now why is it not entirely reasonable and proper, that the words should be then written with such explanatory allegations (*or inuendoes*) as serve to make clear and distinct the nature of the injury concerning which complaint is made? We think we are carrying into effect the intention of the Legislature when we hold that this may be done. We are sure, that in so deciding, we are prescribing a simple and sensible rule.

Let the judgment be affirmed.

No. 11.—JOHN A. COGBURN, administrator, &c. plaintiff in error, *vs.* HUGH J. OGLEBY, administrator, &c. defendant in error.

[1.] B gave all his property to his executors, for the support and maintenance of his family, in the first instance; then directed that if either of his children (who were sons) should die after marriage, without leaving a child or children living at the time, the wife should have 500 dollars; next, he declared it his will, that as his children should marry or come of age, his executors should give off to such child such portion of his estate as he might think for the best, but that the title to such portion should not be divested from his estate, nor such child acquire any title to the same; but the property was to belong to his estate until the youngest child should marry or come of age, and then should be brought into the general fund and divided among all his children equally, share and share alike. The testator further provided, that if all his children should die without leaving children living at their death, all his property should be made a poor school fund of, for the benefit of the poor of P. County. L, a son of the testator, died after he was twenty-one, but before the youngest son had married or was of age. On this state of facts: *Held*, that the administrator of L could recover no portion of the *corpus* of his share, but that the same vested in the survivors of B's children, when the youngest married or came of age.

In Equity, in Morgan Superior Court. Decision on demurrer, by Judge HARDEMAN, September Term, 1855.

The will of George L. Bird provided as follows:

"*Item* 1*st*. I will and desire that all my property, both real and personal, should be kept together, under the management and control of my executors, to be hereafter named, for the support and education of my family.

Item 2*d*. I give to my executor the privilege of selling such part of my estate as may seem best to him, either for the payment of my debts or for the better management of my estate.

Item 3*d*. Should my wife Phebe marry, it is my will that my executor shall furnish her with a genteel and comfortable support out of my property during her life.

Item 4th. It is my will, should any of my children die af- marriage, and without leaving any child or children born said marriage, living at the time of said child's death, then, t the wife of such child shall receive five hundred dollars n my estate, and no more.

Item 5th. It is my will, that as my children should marry become of age, my executor shall give off such child such tion of my estate as he may think for the best, for the pose of managing, and controlling, and deriving the prof- or increase to himself. But the title to such property ll not be divested from my executor, nor such child ac- re any title to the same. But said property shall belong ny estate until the youngest child shall marry or become age, and then shall be brought into the general fund, to be ided among all my children equally; share and share te.

Item 6th. My farther will and desire is, that should all children die without leaving children living at the time of ir death, all my property shall be made a poor school d, "for the benefit of Putnam County." Wm. B. Carter appointed executor.

The executor refused to qualify, and an administrator, h the will annexed, was appointed. Lorenzo Bird, one of children, after his arrival at age, continued to live with family until he died, which was before the youngest child rried or arrived at age.

John A. Cogburn, as the administrator of Lorenzo Bird, d a bill against the administrator *de bonis non*, of George Bird, alleging that Lorenzo Bird contracted a great many bts, and that he had no property to pay except his interest his estate, and praying an account for his equal share of rents, issues and profits of said estate, up to the time that youngest child arrived at age or married; and that his re of the *corpus* of said estate be decreed to his adminis- tor, upon the final distribution.

Upon demurrer, the Court held, that under the will of George L. Bird no interest in the *corpus* of the estate vested in Lorenzo Bird, until the time of final distribution; and that Lorenzo having departed this life before the time for that distribution, his administrator could recover no part of the *corpus* of the estate.

This decision is assigned as error.

J. WINGFIELD; T. R. R. COBB, for plaintiff in error.

J. HILL; CONE, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

The question raised by this record is, whether the interest, by the will of George L. Bird, conveyed to his son Lorenzo, was intended to vest in the latter at the death of the testator; or not until the youngest of his children should arrive at age or marry? That is to say: whether the words of this will postponed the vesting of Lorenzo's share until the happening of one of the things just stated, and thus made the bequest contingent and dependent upon this event for its consummation; or, whether they postponed the possession merely until that time, but conveyed a vested interest at the death of the testator?

In the former case, the share of Lorenzo may pass to the survivor of George L. Bird's children. In the latter, it must go to his administrator, and is subject to the payment of his debts.

The proper rule on this subject, to be deduced from what has been written and decided, as well as from the dictates of good sense, we take to be this: If futurity be annexed to the *substance* of the gift, the vesting is suspended; but if it relate to the *time of payment* only, the title vests instantly upon the death of the testator. (*Onslow vs. South*, 1 *Eq. C. Abr.* 295. *Cruse vs. Burley*, 3 *P. Wm.* 20. *Snell vs. Dee*, 2. *Salk.* 415. 1 *Jarm.* 760.)

Thus, where property is given by will to one when he shall attain the age of twenty-one years; or at the age of twenty-one, or at the expiration of a definite period from the testator's death, or when that person or another shall marry, the vesting, itself, and not merely the possession, is deferred, and a contingent interest is conveyed. If, however, the gift be, in the first instance, to the devisee or legatee, and is then directed *to be paid*, at the age of twenty-one, or when the event specified shall happen, then the title to the same vests immediately upon the death of the testator.

Accordingly, it has been held, that though a devise of lands to A if or when he shall attain the age of twenty-one years, by itself, would confer a contingent interest only; yet, that if the devise be to trustees for the performance of testator's will, until such time as A should accomplish his age of twenty-one years, and *when* he should come to his age of twenty-one, then to be to him, his heirs and assigns, forever; in such case, the estate vested immediately in A, and he dying before twenty-one, the same passed to his representative. (*Boraston's Case*, 3 *Rep.* 19. *Mansfield vs. Dugard*, 1 *Eq. C. Abr.* 195. *Goodtitle vs. Hayward*, 1 *Burr.* 228. *Doe d. Weedon vs. Lea*, 3 *Durn & E.* 41. *Doe d. Wright vs. Cundall*, 9 *East.* 400. *Doe d. Cadogan vs. Edward*, 7. *Ad. & Ell.* 636. *Hanson vs. Graham*, 2 *Ves.* 239. *Lane vs. Goudge*, 9 *Ves.* 225.)

These cases and many others which might be cited, go upon the idea that it was the intention of the testator, that immediately upon his death an interest in the estate conveyed should vest and take effect in the devisee or legatee, and that his possession only was postponed. The special characteristic being, *that there is a prior interest extending over the whole period for which the devise or bequest is postponed.*

And the Courts put their judgments in all the cases upon the ground, that there is something in the will which shows that such was the intention of the testator.

In endeavoring to give effect to this construction, some Courts have held, that though a devise to a particular person, if he shall live to attain a particular age, standing alone, is

contingent; yet, if it be followed by a limitation over in case he die under such age, the devise over is considered explanatory of the sense in which the testator intended the devisee's interest in the property to depend on his attaining the specified age, viz: that at that age, it should become absolute and indefeasible; the interest in question is therefore construed to vest instanter. *Doe d. Hunt vs. Moore*, (14 *East.* 601.)

The distinction here is somewhat subtle; but it rests upon the principle, that unless some immediate interest had been conveyed to the devisee, there would have been nothing to *go over* upon the contingency of his death before twenty-one, and the words giving the devise this direction have no meaning. Thus, it will be observed, proceeding upon the idea, that there was a prior estate extending over the period for which the devise was postponed.

It is well settled, too, that an estate may be conveyed by will, which vests immediately upon the death of the testator, subject to be divested upon the happening of a specified contingency. Thus, in *Edwards vs. Hammond*, (3 *Lev.* 132,) where A surrendered the reversion in fee in customary lands to the use of his son H, and his heirs, &c., *if it should happen that he should live until he attained the age of twenty-one years;* provided always, and under the condition, nevertheless, that if H *died before he attained that age*, then, the premises to remain to A in fee; it was held, that this was an immediate devise to H, subject to be defeated upon a condition subsequent, if he did not attain the age of twenty-one years.

We have taken these principles carefully into consideration in the investigation of the points raised upon this will; and in view of its whole structure, are of opinion, either that no estate vested in any child of George L. Bird, until the youngest should come of age or marry, or that, if any interest did so vest, it was subject to be divested upon the contingency of the child dying before the time specified. In either event, as Lorenzo died before the happening of the specified

ontingency, his representative is not entitled to recover the
rpus of his share in such estate.

At the hearing, a majority of this Court were inclined to
ink that this testator intended to give his property to his
ildren, (the child or children of any child who might depart
is life before the contingency contemplated, to stand in the
ace of the parent,) as tenants in common, not to be divided
ntil the youngest child come of age or marry; subject to be
ivested as to any child, by that child's dying before the con-
ngency specified, without leaving issue living at the death; in
hich event, his share should go to the survivor or survivors,
xcept the sum of five hundred dollars, which should be paid
the widow of such deceased child.

For myself, subsequent consideration has strengthened and
onfirmed the impression, that the interest of Lorenzo Bird
ever did vest in him; and cannot, therefore, be said to have
een divested.

I think it evident, from the whole will, that the vesting of
he interest was intended to be postponed until the youngest
hild should marry or come of age; and that there was no ti-
le to any portion of the property in Lorenzo, *extending over
he period from his father's death until his own.* Indeed, I
hink that especial care was taken by the testator to prevent
his result, and that appropriate terms were used by him for
his purpose. When such terms have been employed, Courts
ave held, that the contingent estate will be supported, and
ave excluded such a construction as that of which we have
een speaking, and which supports the immediate vesting of
he interest.

Thus, it has been held, "that the rule of construction under
onsideration, is also excluded by a declaration, that the dev-
see shall take a vested interest at a future period, as such a
leclaration obviously carries with it an implied negation of
n earlier period of vesting." *Glanville vs. Glanville*, (2
Ver. 38.)

Now in the fifth clause of this will, when the testator makes
rovision that his executor shall, in his discretion, give off to

his children, as they may marry or become of age, such portion of his estate as the executor "may think for the best," for the purpose of allowing the child to manage and control, and receive the profits of the same, he goes on to provide, that "the title to said broperty shall not be divested from my executor, nor such child acquire any title to the same; but said property shall belong to my estate until the youngest child shall marry or become of age," &c. A declaration of intention utterly inconsistent with the idea, that he intended such interest to vest in Lorenzo immediately upon his decease.

It is true, that in this case, the testator gave his property (to a trustee) for the education and support of his family, from and after his death, and provided that it might be given off, in the discretion of his executor, to his children, upon their coming of age. But he did not give the *whole* of this property to the support of his children. On the contrary, he made provisions for the support of his wife out of it. And, in plain words, he said that he did not intend the title to vest in his children until the contingency specified should happen.

It is true, too, that it has been held, where property was thus bequeathed upon a future contingency, and in the mean time, the proceeds were directed to be applied to the maintenance of the devisee or legatee, that the same vested immediately upon the testator's death. (*Fonnereau vs. Fonnereau*, 3 *Atk.* 645. *Knight vs. Knight*, 2 *Sim. & Stua.* 490.)

But in these cases, there was nothing in the will of the testator expressing a different intention; and therefore, the maintenance was looked to as an interest extending over the period for which the vesting was postponed. In the case before us, the intention is plainly expressed, that though the estate is to be applied to the maintenance of the children, the title is not to vest in them until the contingency specified shall happen.

In the leading case of *Leake vs. Robinson*, (2 *Mer.* 363,) where a testator gave certain real and personal property to trustees upon trust, in a certain event *to pay and transfer the same unto and amongst all and every the brothers and sisters*

f R, share and share alike, upon his, her or their attaining wenty-five, if a brother or brothers, and if a sister or sisters, t such age, or marriage with consent. And the trustees were uthorized to apply the rents, and profits, and interest, or o much as they should think proper, for the maintenance of uch brothers and sisters in the mean time. Sir *Wm. Grant*, I. R. held that this was not a case in which the enjoyment nly was postponed; the direction to pay was the gift, and hat gift was only to attach to children who should attain wenty-five.

So, where a testator left for his wife's use certain furniure, &c. adding, "which I desire may be distributed among ur children on the youngest attaining twenty-one years, at ier and my executor's discretion—such part being, nevertheess, for her own use, as may be thought convenient: and at ier death, to be distributed as above directed." Sir *J. Leach*, V. C. on the principles above stated, held that children who died before the youngest attained twenty-one, took o interest. *Ford vs. Rawlins*, (1 *Sim. & Stud.* 328.)

In another case, where a testator bequeathed £1500 to rustees, the dividends to be paid to R, wife of his son G, for he benefit of the testator's son, of herself, and of their children during the life of his son; and after his decease, to reain in trust for the benefit of his wife and children during ier lifetime, if she remained a widow; and at her decease, o be equally divided among all her children by his son G, *f they should have attained the age of twenty-one years;* but hould any of them still be minors, the share of such child or hildren to be held in trust for them till twenty-one years of ge, when the principal should be paid to them, *the dividends n their shares being applied, by the trustees, to their maintetance while minors*; and in the event of R marrying again, ier children by G were then to receive their separate portions thereby devised, as they *attained twenty-one years*, although their mother were living. Sir *L. Shadwell*, V. C. was of opinion, that according to the true construction of the words of the codicil, there was no gift to any of the children

except those who attained twenty-one. *Taylor vs. Bacon*, (8 *Sim.* 100.)

Other cases to this effect might be cited, but I must content myself with the references I have made. These strongly support the construction which I place upon the will.

My conclusion, therefore, is, that the testator intended to convey his property to his executor, in trust, for the support and maintenance of all his family, and for the education of his children, until the youngest came of age or married, when he designed that the same should vest in the survivor or survivors, and in the child or children of any one of his children who might, before that time, die, leaving such, his issue, the latter representing his or their parent, that if any child of the testator should die without leaving issue, then nothing of said property was to pass to his heirs or representatives; but the testator gave to his wife the sum of five hundred dollars.

Judgment affirmed.

12.—Wm. Robinson *et al.* plaintiffs in error, *vs.* The nk of Darien, defendant in error. The State of orgia, plaintiff in error, *vs.* The Administrator of mes Holford, deceased, defendant in error. Wright, ll & Co. plaintiffs in error, *vs.* The State of Georgia, fendant in error. The State of Georgia, plaintiff in or, *vs.* The Bank of Milledgeville, defendant in er-. The State of Georgia, plaintiff in error, *vs.* The nk of Hamburg, defendant in error. The Planter's nk and Another, plaintiffs in error, *vs.* The State of orgia, defendant in error. The State of Georgia, intiff in error, *vs.* The Planter's Bank, defendant in or.

The Bank of Darien was incorporated with a capital stock of $1,000,000, ded into $10.000 shares of $100 each; 5.000 shares were subscribed by the State, valued at $500.000, upon which 65 per cent. or $325.000 paid in, prior to 1834. Upon the petition of the President and Direct- of the bank, an Act was passed that year, to extend the charter to the 1st of January, A. D. 1855, with this *proviso:* "Nor shall any thing be so trued as to authorize the President and Directors to call in an additional alment upon the stock of the State:" *Held*, that notwithstanding the aid capital stock may be a trust fund, for the satisfaction of corporation s, yet the right to call in the unpaid instalments on the State stock in Darien Bank, was taken away by the Act of 1834.

n Act to extend the charter of a corporation, by usage, includes the s or condition upon which said extension is granted.

n unconstitutional Act, although void as a law, may, nevertheless, op- s as notice, not only to the corporation who accept of it, but to third ons, who act upon it.

he debts contracted with a bank must sometimes, of necessity, be paid roperty or in stock of the bank itself, or of some other bank. In ei- case, it continues a part of the capital stock, to which the stockhold- have no immediate claim; and is a fund to which the creditors of the k must look for payment of their claims; and for the unpaid instal- ts upon such stock, the corporation, and not the stockholders, is re- nsible.

ll reasonable and proper expenditures incurred by a receiver or other t, in winding up the affairs of an insolvent bank, are legitimate charges

against the trust fund, and should be allowed, unless shown to be over-charged or wrongfully charged.

[6.] By the general law of the land, as well as by the 6th section of the Act of 1841, (*Cobb*, 139,) the notes and bonds payable at and discounted at an bank, may be paid in the bills of that bank; and that, too, notwithstanding said notes or bonds may be transferred to any other bank; and the right continues, even after the note or bond has been carried into judgment. The notes or bills of a bank, which form the common currency or circulating medium of the country, should be protected in preference to every other class of debts; and all Statutes passed for this purpose, should be liberally construed, to effectuate this policy.

[7.] The sovereign right of the State to priority of payment out of the effects of an insolvent, is based upon the Common Law, and was adopted by the Act of 1784, which introduces into the Jurisprudence of Georgia the whole body of the Common Law, not inconsistent with our new frame of government, and subject, of course, to legislative modification. It is a wholesome right; and as such, should receive the sanction and approbation of the Courts.

[8.] This right of priority is not inconsistent with the principles or spirit of our institutions; but is necessary for the protection of the public revenue, so as to enable the Government to accomplish the end of its institution.

[9.] It does not exist here with all the incidents to the royal prerogative right in *England*. We have not the writ of protection, nor the extent, in chief nor in aid; the priority of the State is a rule only in the distribution of the property of the debtor, requiring the debt due to the State to be first paid where the individual creditor has no antecedent lien over-reaching it.

[10.] A State, by becoming a stockholder in a private corporation, does divest itself of its sovereign right as a creditor.

[11.] The State, it is true, by becoming interested with others in a banking corporation, does not impart to that corporation any of her privileges or prerogatives, so far as it respects the transactions of the corporation; but the doctrine goes no further.

[12.] Although it is a favorite policy with a Court of Chancery to distribute the assets of an insolvent debtor, among all the creditors *pari passu;* yet, when a judicial preference has been established by the superior legal diligence of any creditor, that preference will be observed in the distribution of the assets.

[13.] Although the weight of authority may be, that in regard to *equitable assets*, the creditors, as between themselves, are all equal and are to share in proportion; yet, the rule is clearly different as to *legal assets;* as to these, the *execution creditors* are entitled to a preference.

[14.] The broad and most sensible distinction between legal and equitable

ts is this: the former can be reached and made liable to the creditor legal remedies; whereas, on the contrary, to obtain possession of the itable interest of the debtor, the judgment creditor must go into Equity.

The State having redeemed more than one half of the outstanding cir- tion of the Darien Bank, no further liability attaches to her as a stock- ler.

Bank notes, although fraudulently put into circulation; or even stolen, ome the property of him who gives valuable consideration for them, ing no knowledge of the fraud or robbery.

A party who proves the loss of a bank note, is entitled to require of the k payment of the same, provided suitable indemnity be tendered.

l appeal, in Baldwin Superior Court. Decision by Judge DEMAN.

ne following were the facts agreed on in the several cases h were heard together:

he Planter's Bank of the State of Georgia recovered a ment, in due form of law, in McIntosh Superior Court, mber Term, 1840, for the sum of $28.395 00, with in- t on $20.000, from the first day of April, 1839; inter- t on $7.235, from the 23d day of March, 1839; interest 160, from the 25th day of March, 1839, and interest on esidue, $1000, from the 8th day of December, 1840 and $\frac{25}{100}$ costs. Part of said judgment, viz: $7.395, was on bank of the Bank of Darien, duly demanded from the Bank arien, and protested for non-payment. The rest of the ment was on bills of exchange and checks of the Bank of en, drawn on South Carolina and New York, and return- rotested for non-payment. Execution duly issued on said ment, and the execution was duly returned by the Sher- f the Counties of Chatham and McIntosh, respectively, *d.bona*. Returns dated 10th November, 1847, and 25th ember, 1847. The said protested bills of exchange or ks, so given by the Bank of Darien, were given in re- ption of bank bills of the Bank of Darien, presented ac- ling to the custom of banks for payment by the Planter's k, to the Branch Bank of the Bank of Darien in Savan-

The Bank of the State of Georgia recovered a judgment, at the same Court and Term of Court, against the Bank of Darien, for the sum of $12.764 $^{93}/_{100}$, with interest, from the 22d day of July, 1839, and the further sum of $3.009 $^{84}/_{100}$ with interest, from the 29th March, 1839, and $14 costs. This judgment was on bills of exchange or checks and on certificate of deposit. The bills of exchange or checks were given by the Bank of Darien, in redemption of bank bills of the Bank of Darien, presented according to the custom of banks in Savannah for payment by the Bank of the State of Georgia, and were returned protested for non-payment. Execution duly issued on this judgment, and the execution was duly returned by the Sheriff of McIntosh County, 26th November, 1846, and 27th June, 1853. The Bank of the State of Georgia collected and received from the Bank of Darien part of said judgment, leaving due thereon on the 8th September, 1839, the principal sum of $12.764 $^{93}/_{100}$, with interest from 8th September, 1839, and costs.

The Bank of Darien chartered, in 1818, went into operation April, 1819, with a subscription of One Million of Dollars, of which the State subscribed for half, and individuals for half. The first "state of the bank" of the Bank of Darien, shows that the capital then paid in on account of subscriptions, was $228.500. The amount in specie then on hand, was $100.046 $^{91}/_{100}$. The amount in bank notes, of the Bank of Savannah, was $123.592, and in notes of banks of Augusta, $256. Total specie and bank notes, $223.894 $^{91}/_{100}$. Instalments on stock were called in from time to time, to the amount of sixty-five per centum; the remaining thirty-five per centum was never called in. The State of Georgia paid on its subscription $325.000, and individuals paid the same. In 1834, the charter of the Bank of Darien was amended, with certain provisions, and the creditors above named became such creditors in the year 1839.

On the 10th day of Dec. 1841, the Legislature of Georgia passed an Act to repeal the charter of the Bank of Darien, and to provide for a settlement of the affairs of the said bank.

On the 7th January, 1842, certain stockholders of the capital stock of the Bank of Darien, viz; Richard R. Cuyler, executor of P. Gibson and Robert Jackson, protested to his Excellency, the Governor of Georgia, against the said Act of 1845, and did refuse, by way of protest, to allow the provisions of said Act to be carried into effect. The Governor of the State received that protest, and on the 15th January, 1842, declined to respect it, as shown in his letter of that date.

The original individual subscribers to the stock of the Bank of Darien are shown in the written list attached to the plea of the defendants.

In March, 1842, the Central Bank of Georgia, by order of the Executive, took possession of the assets, books and papers of the Bank of Darien. It received the assets, books and papers of the principal Bank of Darien from the principal bank; it received the Macon branch assets and books from Mr. King, the cashier; the Dahlonega assets, and books from the cashier of that Branch; and the Central Bank then appointed John R. Anderson, an officer, to wind up the affairs of the Bank of Darien. Said Anderson gave a bond to do that duty, in the penalty of $10.000. Said Anderson had, for several years before, been and then was, cashier of the Branch of the Bank of Darien at Milledgeville. When the Central Bank so appointed him agent to wind up the affairs, it turned over to him everything, just as the Central Bank received it, appertaining to the principal bank, the Branch at Macon and Branch at Dahlonega, and left him in possession of the papers, books and assets of the Branch at Milledgeville, of which he was cashier.

Schedule A hereto annexed, shows what so went into Anderson's hands, except a large sum of old Milledgeville assets, which the said John R. Anderson had received as cashier, but had never entered into his books as cashier. Anderson became a defaulter, and was ordered, by the Executive, to make a return of his actings in relation to the assets of the Bank of Darien.

Schedule B, hereto annexed, shows what Anderson returned to the Central Bank in 1844. Said Anderson collected from the said old Milledgeville assets considerable sums, and he paid in account thereof to the Central Bank $9.461, during the investigation of his acts as agent.

The collections which Anderson made, (beside and beyond the said $9.461,) were as follows:

In Certificates of Deposit and Checks on the Bank of Darien,		$21.421 16
In current, good money,		1.922 34
In Darien Bank Notes,		49.263 46
		$72.606 96

He so collected that amount from the following items, viz:

Bank Balances,	$1.446 94	
W. B. Wofford,	7.738 39	
Real Estate,	6.227 94	
Discount Line,	52.368 22	
Branch Macon,	233 49	
Interest,	5.321 68	
	$73.386 66	
And he turned over to the Central Bank a partial payment at Dahlonega,	779 70	$72.606 96

After the said Anderson so made his return and accounted to the Central Bank for said sum of $72.606 96, the Cashier of the Central Bank was intrusted with the assets of the Bank of Darien, and all its books and papers. He made the following collections from the assets:

In Darien Bank Notes,	$115.939 00

In Certificates of Deposit and Checks of the Bank of Darien,		3.722 48
In current, good funds,		33.876 05
		$153.537 53
Which, added to the collections of J. R. Anderson, as above, and turned over by him to the Central Bank,		72.606 96
Shows the sum of		$226.144 49

as the total collections by the Central Bank from the assets of the Bank of Darien, save and except certain lands in Mississippi, taken for debt.

The Central Bank paid out the said current funds, amounting to $33.876 57, as follows:

Paid sundry expenses,	$16.309 01	
Paid John G. Winter, the oldest judgment creditor of the Bank of Darien, whose judgments were on bank bills of the Bank of Darien,	14.483 60	
Paid to the Planter's and State Banks, on account of their judgments,		
$2.721 64		
862 32		
	3.083 96	$33.876 57

Of the other funds collected, (beyond the said current funds, $33.876 57,) by the Central Bank, no part has been paid to the creditors above mentioned. The Central Bank, by order of the Legislature, burnt and destroyed all the Darien Bank bills it had received, in any way, except $26.642, which amount it turned over to the Treasurer of the State, in whose hands it now remains.

The Darien Bank notes collected by Anderson, as above, were collected between March, 1842, and May, 1844.

The Darien Bank notes afterwards collected by the Cashier of the Central Bank, as above, were collected in the following years:

1844,	$15.000	1845,	$50.000
1846,	15.000	1847,	20.000
	1850,	$15.939	

In making collections from the assets of the Bank of Darien, the Central Bank received, in Darien Bank bills, from debtors of the Bank of Darien, after judgment obtained against them by the Bank of Darien, the sum of $42.620 22, which sum of $42.621 22 was part of the said $115.939, before stated, as collected by the Cashier of the Central Bank, and burnt.

The State sued Anderson's official bond, as agent, in Baldwin Superior Court, and recovered the penalty of $10.000. The Central Bank received the amount, and it is part of the said current funds collected by it, as above.

The bond of Anderson, as cashier of the Branch Bank at Milledgeville, was sued against him and his securities in Greene County. Judgment was recovered for $. Part of this judgment was paid in good money, and forms part of the aforesaid current funds collected by the Central Bank. The balance of this judgment, $12.723, was received by the Central Bank, under a resolution of the Legislature, in Darien Bank bills. The Central Bank also received $3.722 $\frac{1}{100}$ rent of real estate, in Darien Bank bills.

The State has accounted to the Planter's and State Banks for the lands in Mississippi; and the amounts received by these Banks have been credited on their judgments.

The said payments from the land in Mississipi, and the amounts received by the said banks on said two judgments, were as follows:

February 17th, 1854,	$2.728 03	
August 17th, 1854,	2,950 00	
October 20, 1854,	10.085. 56	$15.763 59

After applying all the credits hereinbefore set forth, the m due on the said judgment of the Planter's Bank, being r principal, balance of interest and costs, is,, on the 1st arch, 1855,

Principal,	$28.396. 00
Bal. of interest,	23.015 78
Costs,	71 25
	$51.482 03

id the sum due on the said judgment of the Bank of the tate of Georgia, being for principal, balance of interest and sts, is, on 1st day of March, 1855,

Principal,	$12.764 93
Bal. of interest,	9.962 96
Costs,	14 00
	$22.741 89

The Bank bills, amounting to $7.395, sued to judgment as oresaid by the Planter's Bank of the State of Georgia, ere, after judgment, duly sealed up and delivered to the entral Bank, and entered on its books as received by it.

The Bank of Darien made a return of its condition and its ockholders, semi-annually, to the Governor, according to w. The last return made, October, 1841, showed that individuals held stock to the amount of $94.195, and that the tate held stock to the amount of $325.000; and the balance the capital stock paid in, $231.855, had been, before that me, redeemed and purchased by the Bank of Darien, chiefly ken by the Bank from debtors, in payment of their debts the institution, part for a lot of land sold to the Marine &

Fire Insurance Bank of the State of Georgia, and part for what reason is not known. The printed return is to be read in evidence.

On the 25th December, 1843, by joint resolution of the General Assembly, a commissioner was appointed to investigate the affairs of the Bank of Darien. The commisioners reported in May, 1844, and that report is to be read by either party on the trial. The printed report of D. C. Campbell, director, under resolution of December, 1847, is to be read in evidence.

In 1844, Darien Bank bills were at a depreciation of 50 per cent.; and they have been at a like or lower rate ever since. Said bills have been at a depreciation ever since the end of the year 1841. The Central Bank passed the following resolution, which appears on its minutes:

TUESDAY, Nov. 29th, 1842.

Board met. Present, Tomlinson Fort, President, Wm. T. Hansel, Director:

Ordered, that John R. Anderson, the officer in charge of the assets of the Bank of Darien, instruct, by letter, the Attorneys or agents having charge of the collection of the debts due the Bank of Darien, that in all cases of judgment now existing or which may hereafter be obtained in favor of said Bank, that payment will be required in specie or its equivalent.

The certificates of deposit and checks on the Bank of Darien, as well as the Bank bills of the Bank of Darien, herein before mentioned as collected by Mr. Anderson, and by the cashier of the Central Bank, were taken from debtors in settlement of the debts which they owed to the Bank of Darien wherever the same were claimed as a set-off.

The debt due to John G. Winter on his said judgment against the Bank of Darien, was paid by the director of Central Bank, under resolution of the General Assem

passed in December, 1847. Payment was made, of principal, $9.002; interest before judgment, $83 14/100; interest from the 24th August, 1840, to March, 1848, $5.398 46/100. The judgments of J. G. Winter were founded on bank bills of the Bank of Darien.

In March, 1842, the State held of Darien Bank bills, $54.180, which bills were never redeemed, but were burnt by order of the Legislature. And the State was further a creditor of the Bank of Darien, in the sum of $25.897 96/100, which amount has never been paid.

The various judgments against the Bank of Darien mentioned in Mr. Campbell's said report, were all dormant at the institution of these claims, except the judgments of the Plan-Bank—of the Bank of the State of Georgia—of the Mechanic's Bank, Augusta, and of the Bank of Milledgeville.

The assets so delivered, as aforesaid, by the Bank of Darien to the State, consisted (except real estate and rents thereof) entirely of promissory notes, bills of exchange and other choses in action, and judgments—being debts due the Bank of Darien—some running and some past due; and the amount hereinbefore set forth as collected, embraced items of interest as well as principal.

The Bank of Darien suspended specie payment before the passing of the Act of December, 1841, repealing the charter.

The judgment creditors, at the request of the Executive of the State and the Central Bank director, waived, without prejudice to their claims, their lien on the real estate, to enable the director of the Central Bank to sell it to better advantage, as they believed. The director of the Central Bank accordingly sold the real estate, and it brought the sum of $6.011 75/100.

On the 16th day of February, 1842, the Bank of Darien transferred to the Central Bank of Georgia 3567 shares of the capital stock of the Bank of Darien. This is the stock which the Bank of Darien redeemed, as hereinbefore set forth. The capital stock was never reduced, by the Bank of Darien, on its books. Between April, 1819, and 17th No-

vember, 1828, there had been purchased by the bank 256 shares, as shown by the first return of the bank to the Governor, and the remaining amount of stock was purchased up between then and the date of the Act of repeal. The State of Georgia has realized nothing on said redeemed stock.

All the remaining assets of the Bank of Darien are insolvent. Mr. Nisbet, the late Cashier of the Central Bank, swears that Mr. Campbell, the late director, endeavored to collect them, but could not succeed.

The Bank of Milledgeville, at the Term of September, 1844, of Baldwin Superior Court, recovered a judgment in due form of law, against the Bank of Darien, for the sum of $2210, with interest from the 1st day of April, 1842, and thirteen dollars and twelve cents costs. This recovery was on bank bills of the Bank of Darien duly demanded, and a clear schedule of the same is apparent on the record. Upon the rendition of the verdict, Mr. Day, one of the plaintiff's Attorneys, (by order of Court, as Mr. Day swears, to the best of his recollection,) marked on the face of the bank bills, "in judgment," sealed them up in an envelope and deposited them in the Clerk's office with the Clerk. Mr. Day swears, that the bank bills have never been, to his knowledge, withdrawn from the Clerk's office; that he has seen the package of bank bills in the Clerk's office since judgment was rendered; that William Steele, the then Clerk, asked Mr. Day what should be done with the package, and that Mr. Day told him they were a part of the record in the case. Mr. William Steele, late Clerk of Baldwin Superior Court, left the papers and package of bank notes in the office when he ceased to be Clerk. The package of bank notes, on search, cannot be found in the Clerk's office.

And the Bank of Milledgeville, at the September Term of Baldwin Superior Court, 1843, recovered a judgment against the Bank of Darien, for 852\frac{45}{100}$, with interest from 25th September, 1839, and thirteen dollars and twelve cents costs. This recovery was for the collection of a note made by the Bank of Darien on account of the Bank of Milledgeville.

Service of process in each of the suits brought by the Bank of Milledgeville, was perfected on the head of the Central Bank, under the law of 10th December, 1841. Executions duly issued on the respective judgments. No part of these judgments has been paid.

The decisions of Judge HARDEMAN will be understood from the decision of the Supreme Court.

I. L. HARRIS, A. H. COOPER, JAS. GARDNER, Jr. JOHN E. WARD and F. H. CONE, were heard in behalf of the creditors.

R. H. CLARK, for the State.

The following opinions were delivered by the Court:

LUMPKIN, J.

Sundry individuals and corporations, creditors of the Bank of Darien, insisting that the State of Georgia was liable to them for the whole amount of their demands, or some considerable portion thereof, the Legislature of 1853–'4 passed an Act providing for the liquidation and settlement of these claims. Commissioners were appointed, in the first instance, to hear and determine upon their validity, the Governor, as the representative of the State, and the creditors, having the right, respectively, to appeal from the award of the commissioners to the Superior Court, and from the decision of that Court to the final judgment of this Court. And the State, disrobing herself of her sovereignty, gracefully and magnanimously pledged her faith to pay to the claimants whatever sums they should be found legally and justly entitled to.

The following is a correct statement, in substance, of the facts agreed on between the Counsel representing the State and the creditors, respectively, and collected from the public archives.

The Bank of Darien was incorporated on the 15th of December, 1818, with a capital stock of $1.000.000, divided in-

to shares of one hundred dollars each, and of which 5.000 shares were reserved, to be taken by the State. And on the day following, a joint resolution was passed by the General Assembly, authorizing the Governor to subscribe for the 5.000 reserved for the State. (*Journal of the Legislature of* 1818, *p.* 92.)

In 1819, an Act was passed providing for the payment of instalments then due and thereafter to become due, on stock in the Bank of Darien, and vesting certain funds in the stock of said bank. It required the Governor to vest $100.000 in said stock, a fund which had been set apart for the establishment and support of free schools, and $100.000, which had been appropriated for the improvement of the internal navigation of the State. Besides this, the further sum of $175.000 was appropriated to be drawn for from time to time, as future instalments should be required. (*Lamar's Digest*, 102.)

In 1828, the Central Bank was incorporated, and the shares owned by the State in the Bank of Darien, together with other stocks and funds, were vested in the President and Directors of said bank, and their successors in office. The whole constituting the capital of said bank, and subject to the payment of all bills and notes issued by said bank. (*Prince*, 72.)

[1.] In 1834, an Act was passed to extend the charter of the Bank of Darien, and the Acts then of force amendatory thereto. This extension, as the preamble recites, was granted upon the petition of the President and Directors of the bank. By the first section of this Act the charter and all the Acts of the General Assembly amendatory thereto, are prolonged to the 1st day of January, A. D. 1855, "*Provided*, that nothing in the *charter* shall be so construed as to prevent the State from selling out her stock, and thereby withdrawing her interest at pleasure; in which case, the stockholders should have the privilege of choosing five more directors. Nor shall any thing be so construed as to authorize the Pres-

ident and Directors to call in an additional instalment upon the stock owned by the State." (*Prince*, 71.)

It is important, as will be seen in the course of this investigation, to note carefully the foregoing provisions of this, especially the last clause quoted.

By the 16th section of the Act incorporating the Bank of Darien, it is declared, that "nothing contained in said Act shall be so construed as to take the power of controlling said institution out of the Legislature; but the Legislature shall, at all times, have the power of arresting or suspending said charter whenever it shall be made appear that the said corporation has not complied with all or any of its provisions." (*Prince*, 70.)

Accordingly, in 1841, an Act was passed repealing the original Act of incorporation, as well as the Act of 1834, extending the charter; and to provide for the settlement of the affairs of the Bank. (*Cobb*, 138.)

By this Act, the Central Bank was authorized and required to wind up the affairs of the Darien Bank; collect the assets and pay the debts thereof; and the balance, if any, to pay to those who might be entitled thereto. The number of directors were reduced to five, four of whom were to be elected by the Legislature and one by the stockholders. The board of directors, on the part of the State, were instructed to aid and facilitate the intents of said Act, by turning over, immediately, to the Central Bank, the whole of the assets of the Darien Bank. On all payments to be made on notes originally due the Darien Bank or its branches, and which should be turned over or renewed in the Central Bank, (and the privilege of renewal was allowed by the Act,) the maker or indorser of said notes was authorized to pay up the whole or any part of their notes in bills on the Bank of Darien, issued from the bank or branch bank, in which the said note or notes were originally discounted; and the Central Bank was held bound to take such bills when so tendered. The Bank of Darien was required to execute a deed of conveyance of all its real estate to the Central Bank, and the directors of the Central Bank to

sell the same on such terms and at such times, either at private sale or public outcry, as, in their opinion, should best promote the interest of the stockholders. The liability of the Central Bank was limited to the amount of assets received from the Darien Bank, after deducting all losses which might be sustained by the Central Bank, in cost or otherwise, in settling the affairs of the Bank of Darien. By the 10th section, it is enacted, that "if the directors or stockholders of the Bank, or any of them, should refuse to allow the provisions of the said Act to be carried into effect, the Governor was instructed to have such legal proceedings commenced as might be necessary to protect the interest of the State and all others concerned; and if necessary, to have application made to the Court of Chancery for the appointment of a receiver of the effects of said bank." . (*Cobb*, 138–'9.)

Such is a full and fair analysis of the Act of 1841.

On the 7th of January, 1842, R. R. Cuyler, as qualified executor of Patrick Gibson, owner of 68 shares of Darien Bank stock, and R. B. Jackson, owner of 50 shares, and R. R. Cuyler, Joseph W. Jackson and M. H. McAlister, Esquires, as Attorneys of judgment creditors and other creditors of the Bank of Darien, formally protested against this Act; and filed said protest with his Excellency, Charles J. McDonald, then Governor of the State. The protestants declared that said measure was not taken, because they considered it desirable to continue the business of the Bank, but with a distinct view of placing the assets of the institution under the control of the Court of Chancery. They reminded the Governor of his power, under the law, to apply to the Court of Chancery, to take control of the assets of the bank, and announced their determination to refuse to allow the provisions of the Act of 1841 to be carried into effect; and to ask the interposition of the Judge of the Eastern Circuit.

In the report of the committee on banks made to the Legislature in 1847, in relation to the assets of the Darien Bank, it is stated, that other stockholders of the Darien Bank, on the 30th day of December, 1841, protested against the Act

of 1841. This other and earlier protest has not been brought before this Court in the argument of these cases.

No resistance, however, was ever made to the execution of the Act, by application to the Judge of the Eastern Circuit for any injunctive proceeding or any other redress against the Central Bank, which, by the 16th section of its charter, is made as "capable of being sued in all Courts of record or any other place whatsoever," as any other corporation. On the contrary, the judgment creditors have ratified this Act, notwithstanding their protest and menaced resistance; not only by acquiescing in it for fourteen years and receiving partial payments on their demands though the agency which the Act created, to wit: the Central Bank, but by becoming voluntary parties to this litigation. It is not competent, we apprehend, for these creditors to take and claim under this Act, and yet, refuse to abide by its provisions. Their appearance here to-day, is a virtual withdrawal of their protest.

We should not have deemed it necessary to refer to these documents, not even for the purpose of completing the history of the transaction and of the times, notwithstanding they are introduced into the discussion, but for a single purpose, the bearing of which will more fully appear in the sequel of this case.

Governor McDonald replied to the protestants on the 15th of January, 1842, (other letters of his to the protesting stockholders, bearing dates 1st, 6th and 12th of the same month, are referred to by the committee on banks but have not been brought before the Court in this discussion.) He declined to apply to a Court of Chancery for the appointment of a receiver, placing his refusal upon the ground, that the creditors and stockholders of the Bank of Darien would be "seriously injured by pressing its debtors at a time of great pecuniary embarrassment, as would be the case, if the assets were placed in the hands of a receiver." That "the losses occasioned by urging the speedy collection of the debts by a receiver, would be immeasurably greater than by any future probable mismanage-

ment by the directors." And insisting, that "if the persons actually in interest were to be the victims of an indiscreet policy, the present board of directors had as well be the executioners as any one else." And premising, that "if the effects of the Bank were transferred to the Central Bank, under the Act of 1841, the rights of judgment creditors should be respected; and that as the debts were collected, the proceeds would be applied, doubtless, as the law directs;" meaning, of course, to the judgment creditors.

Thus early, then, and before the Act of 1841 had been carried into effect, we find a distinct recognition, by the Governor, as the representative of the State, of the lien of the existing judgments against the Bank of Darien, accompanied by a solemn pledge, that this lien should be protected. That principle and policy have never been abandoned or repudiated. On the contrary, they have been kept and observed down to the present period. In 1847, the Legislature, by a joint resolution, directed the Central Bank to pay over to the judgment creditors of the Bank of Darien, according to the priority of the same, the sum of $7.252 30, the net balance, after deducting expenses for winding up the same, and deliver to them, in the same manner, the good assets yet remaining, on account of their said judgments. (*Pamphlet Acts of* 1847, *p.* 307.) And as late as February, 1854, it was *resolved*, that the Treasurer of the State do pay over to the Planter's Bank of the State of Georgia and the Bank of the State, the oldest outstanding judgment creditors against the Bank of Darien, or their Attorney, on account of their judgments, rateably to be divided, the proceeds of the sales of land in Mississipi belonging to the Darien Bank assets. (*Pamphlet Acts*, 592.)

We respectfully submit, that the State of Georgia cannot be justly accused of "punic faith", at least, toward the *judgment* creditors of the Bank of Darien. From the correspondence of Governor McDonald, in 1842, down to the action of the last General Assembly in 1854, they have been the objects of the States' constant care and solicitude.

Having thus presented, in chronological order, the legislation of the State, applicable to the questions to be considered, we propose to advert, as briefly as possible, to the prominent facts involved in this investigation.

In March, 1842, the Central Bank, by order of the Executive, took possession of the assets, books and papers of the Bank of Darien, and appointed John R. Anderson to wind up the affairs of the Bank. Anderson had been, for several years before, and then was, cashier of the Branch of the Bank of Darien at Milledgeville. Anderson gave bond for the performance of his duty, in the sum of $10.000. He became a defaulter in 1844, and re-delivered to the Central Bank the assets of the Darien Bank, together with the sum of $72.606 96, collected by him.

The cashier of the Central Bank was then intrusted with the agency of liquidating and settling the affairs of the Darien Bank. He collected $153.537 53, which, added to the $72. 606 96, received by Anderson, made the total collections by the Central Bank from the assets of the Bank of Darien, "save and except certain lands in Mississippi," $226.144 49. Those lands were sold in 1854, by a special agent appointed by the State, and brought the sum of $15.482 03, which, added to the $226.144 49, previously realized, makes the grand total of $241.626 52.

The expenses of winding up the affairs of the bank was $16.309 01. There was paid to John G. Winter, the oldest judgment creditor of the Bank of Darien, and whose judgment was founded on bank bills, $14.483 60 (including interest). There was applied to the two next oldest judgments, at the instance of the State and Planter's Banks, in all, $19.179 18, and there were received, in Darien Bank bills, from the debtors of the bank, who claimed the same as set-offs, $165.246. These items added together, make the sum of $215.217 79, which, deducted from the whole amount received, to-wit: $241.626 52, leaves a balance of $26.408 73 unaccounted for.

In making collections from the assets of the Bank of Da-

rien, the Central Bank received, in Darien Bank bills, from the debtors of the Bank of Darien, after judgments obtained against them by the Bank of Darien, the sum of $42.641 22.

The bond of John R. Anderson, as cashier of the Branch Bank at Milledgeville, having been sued and a judgment obtained thereon, a portion of it, to-wit: $12.723, was allowed to be paid, under a resolution of the Legislature, in Darien Bank bills.

The last semi-annual return made by the Bank of Darien, was in October, 1841, from which it appeared that 65 per cent. had been paid in on the capital stock; that is, $325.000, on the 5.000 shares owned by the State; and the like sum, or a fraction over, on the 5.000 shares held by individuals; and that 3567 shares had been purchased before that time by, and transferred to, the Bank of Darien; which amount of stock had been taken chiefly by the bank from its debtors, in payment of their indebtedness to the institution, part for a lot of land sold to the Marine and Fire Insurance Bank of the State of Georgia; and the residue, upon what consideration is not known. Of this stock it is admitted that 2.565 shares were purchased between April, 1819, and November, 1828, and that the remaining shares, making up the 3.567 were transferred to the bank before the Act of repeal was passed in 1841. It further appears, that the capital stock was never reduced or changed on the books of the bank, and that nothing has been realized on this transferred stock.

Bills of the Darien Bank have been at a depreciation ever since 1841. In 1844, they were at 50 per cent. discount, and have never been worth more, or at a higher rate, since.

In March, 1842, the State held of Darien Bank bills, taken mostly into the Treasury, in payment of taxes and other public dues, $54.180, which bills were never redeemed by the bank, but burnt by order of the Legislature. And the State was further a creditor of the Bank of Darien, in the sum of $25.897 96, which amount has never been paid.

The assets delivered by the Bank of Darien to the State,

consisted (except the real estate and rents thereof) entirely of debts due the Bank of Darien.

It seems, that by virtue of a certain contract entered into between one J. Delafield, as President of the New York Banking Company, and E. S. Reese, former Cashier of the Bank of Darien, a large amount of the bills of the Bank of Darien were put into circulation; and that a portion of these bills came into the hands of James Holford in his lifetime, in the due course of trade and without notice of any fraud in the transaction between Delafield and Reese. And one of the questions made upon this record is, is the innocent bill-holder entitled to recover against the bank upon these bills?

The Bank of Milledgeville, at the Sept'r Term, 1844, of Baldwin Superior Court, recovered a judgment against the Bank of Darien, on bills of the bank. The bills were fully set out and identified in the declaration. Upon the rendition of judgment, Mr. Day, one of the plaintiff's Attorneys, by order of the Court, marked on the face of the bills, "in judgment," sealed them up in an envelope and deposited them in the Clerk's office with the Clerk, Mr. Steele. Mr. Day and the Clerk both state that these bills have never, within their knowledge, been withdrawn from their place of deposit. The Clerk states that he has seen them in the office since the judgment was rendered. The Attorney instructed the Clerk that the packet was a part of the record of the case. It cannot, upon search, be found. Is the bank bound to pay these bills? And if so, upon what terms?

The foregoing is believed to be a correct compend of all the material facts which have been agreed upon by Counsel as the basis of the argument submitted and decision to be made in the premises, with this addition: that the whole amount of the outstanding circulation is $47.342. And that all the claims against the bank originated subsequent to the Act of 1834.

There are three grounds upon which all the creditors of the Darien Bank seek to charge the State with the payment of their demands:

1st. Upon the unpaid stock of $175.000. The State subscribed for 5.000 shares, valued at $500.000, of which $325.000, only, was paid in. The creditors insist that this unpaid stock of $175.000 is a trust fund, out of which they are entitled to be paid.

2dly. They contend, that admitting the State had the right to reduce or restrict her liability upon her original stock, by the Act of 1834, extending the charter of the Darien Bank, and that said Act is a valid law for that purpose; that still, its provisions do not apply to the 3.567 shares transferred to the bank, and that the State is liable for its proportion of the unpaid stock upon these shares; and

3dly. The creditors maintain that the State is responsible, as trustee, for the waste, mismanagement and misapplication of the assets of the Darien Bank, which were turned over to the Central Bank to wind up the affairs of the Darien Bank, under the Act of 1841.

We propose, first, to examine each of these grounds in their order; and afterwards, the minor or collateral points involved in these cases.

[1.] As to the proposition, that the capital stock of incorporated companies is deemed a trust fund for the payment of the debts of the corporation, for myself, and I believe I may say, for a majority of this Court, at least, no doubt is entertained. This doctrine was affirmed by this Court in *Hightower vs. Thornton et al.* (8 *Ga. R.* 493,) and has been recognized and enforced in many leading cases since that time. In a late case in Pennsylvania, *The Bank of Virginia vs. Adams*, (1 *Parson's Select Equity Cases*, 534,) argued by Messrs. Dallas, Randall and other distinguished Counsel, the Court recognized, fully, the jurisdiction of a Court of Equity to compel stockholders to pay the just creditors of the corporation in proportion to the amount of stock subscribed by them respectively, and remaining unpaid. They say that such a jurisdiction is essentially conservative of the rights of the public, which gives credit to the corporation on the faith

of their ostensible capital, and to which such capital is pledged; and that any doctrine short of this would leave the general public subject to be prayed upon by reckless speculators, who will always be found ready to enter into any enterprize in which the prospect of profit seems great, and the certainties of hazard little.

This whole doctrine underwent a thorough examination in the late case of *Curran vs. The State of Arkansas*, (15 *Howard's R.* 304,) and cited in *Curtis's Commentaries, Supplement to 1st Volume, p.* 547; and the decision of this Court in *Hightower vs. Thornton*, (8 *Ga. R.* 491,) is reviewed and fully affirmed, namely: that the capital stock of an incorporated bank is deemed a trust fund for all the debts of a corporation; that it may be followed into the hands of every person save a *bona fide* creditor or purchaser.

This is not the difficulty, then, that the creditors have to contend with. It grows out of that clause of the Act of 1834 to extend the charter, which declares, that nothing therein shall be so construed "as to authorize the President and Directors to call in an additional instalment upon the stock owned by the State." As to *executory* contracts existing at the time this Act was passed, it might be well doubted whether it was competent for the Legislature to release the State from its liability upon its unpaid stock as to such creditors, unless the power to rescind the charter, reserved in the Act of incorporation, confers the right. But the constitutionality of the Act of 1834 cannot be called in question, on the ground that it impairs the obligation of contract. It is agreed that none of these claims existed when this Act was passed.

The first position assumed is, that the Act should be strictly construed, inasmuch as the State, as a sovereign, is legislating for the State as a corporator. And that conceding the President and Directors may not call in an additional instalment for the purposes of banking, that the creditors may nevertheless resort to a Court of Equity to enforce the payment of this stock for the satisfaction of their debts. To me, it ap-

pears plain, that this concession is fatal to the creditors. While the charters of our banks make the capital stock a trust fund for the payment of debts, it can only be reached through the directors, unless the directors neglect or refuse to call in such unpaid capital, or the charter is repealed or otherwise dissolved, so that no board is left for this purpose. No such exigency is alleged here. It is admitted, that by the Act of 1834, the directors were deprived of the power to make any further call. How can it be pretended, then, with any propriety, that credit was given to this fund by the public as the means of re-payment after that time? And yet, this constitutes the foundation for this doctrine. The reasoning is, that the stockholders are relieved from individual responsibility, and the capital stock is substituted in its stead; and its payment by the stockholders studiously provided for and diligently required. Hence, the people look to the capital stock as pledged to the payment of their debts. But how can the unpaid instalments of a corporation be trusted for a payment of debts, when the charter has been so modified as to relieve the stockholder from any further liability on his subscription? Would it not be fraudulent in the corporation to obtain credit upon a fund which it has consented never to collect? And do not those participate in the fund who contract with the corporation, upon the faith of such a fund? No creditor will assert that he ever dealt with the Bank of Darien upon the expectation that this $175.000 would be contributed for the relief of the creditors.

[2.] We cannot be brought into any doubt upon this point. The charter of this bank provides, that it shall have a capital stock of one million of dollars. The State subscribes for one half of the stock or 5.000 shares. By a subsequent Act of the Assembly, $200.000 are specifically directed to be vested in the bank, and $175.000 contingently. The bank receives $325.000 of this money from the State, and proceeds to transact business for the profit of all the stockholders. Upon this fund, then, as well as the unpaid instalments, if credit had been given, a contract would have been implied between the

State and such creditor, not only that the money paid in should not be withdrawn, but that still due should not be withheld, to the injury of the creditor. But we repeat—no such facts exist here. These parties do not, because they cannot, complain that they have parted with their property on the faith of the fund which they are now seeking to subject. Instead of an assurance deducible from the charter, that this unpaid stock should be forthcoming when called for, for the purpose of paying the liabilities of the bank, they are notified, by a counter declaration of the most explicit character, in the Act of extension, that it never shall be required for any such purpose. Ought the State, in the face of this Statutory warning, to appropriate $175.000 to discharge debts created five years afterwards? We think not.

[3.] But secondly, it is said that the Act of 1834 is unconstitutional and void, because the body of the Act contains matter different from the title. It purports to be an Act to extend the charter of the Bank of Darien and the Acts now of force amendatory thereto. By it a Branch at Dahlonega, Lumpkin County, was established, and the State claimed to elect seven directors, and gave to the private stockholders three only, instead of each choosing five according to the original charter. And by it, the president and directors were prohibited from calling in any additional instalments on the stock owned by the State.

The application for extension proceeded from the Bank, as the preamble recites, and was granted upon terms. Is it necessary that the title should indicate the terms? Or are not these implied in every such Act? Many instances of this sort might be cited from the Digests. In February, 1850, an Act was passed "to extend, for five years, the charter of the Central Bank of Georgia." (*Cobb*, 144.) Now the argument is, that under such an Act, any matter different from the original charter, or outside of it, is void. And yet, that Act declares, that the extension of the charter of the said Central Bank of Georgia is granted solely with the view of enabling

it to close its unsettled business, and is not to be construed as conferring upon it any rights or privileges, except to accomplish that end. Here is extension, it is true, but with what a sweeping condition or qualification! . . . .

When a corporation is chartered simply, we look beyond its title to the body of the Act, to ascertain its terms. By custom, the same seems to be true of Acts of extension. The title of the Bank of Darien, itself, is merely "an Act to incorporate the Bank of Darien." (*Prince*, 67.) By the 18th section, stockholders are made individually liable. This is not a necessary element of a bank charter. By the old law, and even by the law as it now stands, individual stockholders are not liable for the debts of the Bank, in their private capacities, unless expressly made so. The Darien Bank was incorporated upwards of thirty years ago. And this was among the earliest, if not the very first charter in which this new feature was introduced. Cannot as strong reasons be assigned against the constitutionality of this individual liability clause, under which these creditors claim, as can be alleged against the clause which is objected to in the Act of 1834? Believing, as I do, that the provision in the 17th section of the 1st article of our State Constitution is one of the best in it, to protect the country against sinister and selfish legislation, I should be unwilling to relax the rules of construction heretofore applied to this clause; and if this Act stood alone, for its binding efficacy, upon this ground, we might feel more embarrassment. But when we recollect that the conditional extension of the charter was applied for and accepted by the corporation itself, as is evidenced by the establishment of the Branch at Dahlonega, and other facts, the parties, themselves, would be estopped, and it would seem to suffice, at least as notice to third persons. An action of trover may be dismissed, because illegally brought; still, it answers the purposes of a demand, so as to sustain a second suit. The publication of this Statute in the *Pamphlet Acts of the Session of* 1834, and its re-publication in *Prince's Digest* in 1837, two years before the credit was given, as one of the

laws of the State then of force, was enough, in all conscience, to put the community upon its guard against trusting to this fund.

[4.] The next ground taken to charge the State with the payment of these debts, is, that before the 16th of February, 1842, the State became the owner of 3.567 additional shares of the capital stock of the Bank of Darien, upon which there had been a payment of sixty-five dollars per share. It is assumed that the balance due upon this stock, constitutes a fund for the payment of the creditors of the bank. And that if the State is not liable to pay the whole amount due upon stock, it is certainly liable for one half, as the stock belonged to the Bank of Darien, and the State owned one half of the stock of that bank. And further, that it was not in the power of the President and Directors of the Bank of Darien, or of the Legislature, to discharge the holders of this stock from the payment of the balance due upon it, if the same is necessary for the payment of the creditors of the bank—such a law would impair the obligation of the contract between the bank and its creditors.

An inaccuracy of statement, as to a matter of fact, is the cause of the fallacy in this branch of the argument. Counsel set out by the assumption, that the *State* became the owner of the 3.567 shares transferred to the bank by its debtors; or at least, one half of it; whereas, in truth, the *State* never owned a single share of this transferred stock. It was transferred to the *Bank of Darien*, and never distributed among the stockholders of that corporation. In the semi-annual report, submitted by James Troup and Eben S. Reese as President and Cashier of the bank, in 1834, in conformity to the legislative requisition, in the list of stockholders, showing the number of shares owned by each, the *bank* is returned as holding this transferred stock. (See *Journals of the Senate of* 1834, *p.* 138.) And so it is in all the subsequent reports.

Whatever liability attached, therefore, to this stock, was a question exclusively between the Bank of Darien and its creditors, and not between them and the stockholders. Had

the bank continued to do business, it might have sold out the stock, or it might as is sometimes done, have divided it among its stockholders. But the bank having failed, nothing was ever realized upon this stock; and it remains, to this day, the property of the *bank*, and subject, like all the rest of its assets, to the payment of its debts.

We feel it to be a work of supererogation to adduce authority to a point that is familiar to every man who has ever occupied the place of director in any bank or business corporation. Said Judge *Davies*, in *Hartridge et al. vs. Rockwell et al.* (*R. M. Charlton's R.* 260,) "In general, the capital stock of a bank is employed in making loans upon personal or other security, and the interest or discount upon such loans forms the profits of the bank, to which each stockholder is entitled, in proportion to the number of shares owned by him. The debts contracted with the bank must sometimes, from necessity, be paid in property *or in stock of the bank itself*, or some other stock. In either case, it constitutes a part of the capital stock, to which the stockholders have no immediate claim, so long as the institution exists; but is the fund to, which the creditors of the bank must look for payment of their claims."

The question is put triumphantly by one of the learned Counsel, suppose dividends had been made upon this stock, would not the State have got her share of the profits? We answer, unhesitatingly, yes—in the same way that she participated in all the profits made by the *bank*, in which she was a stockholder. Shall the State share in the gains and not in the loss? We say again, yes—as a stockholder, the State is entitled to receive her portion of all that is made, subject to such liability for losses as the charter imposes, and none other. It would be an unpardonable trespass to elaborate so plain and familiar a principle. Suppose there had been no individual liability clause in the charter of the Darien Bank, and the stockholders had paid up the full amount of their subscriptions, and the corporation had become bankrupt, with a large outstanding circulation unredeemed, and

other indebtedness unprovided for—could the State have been called on to pay a dollar? And yet, if large profits had been realized, would she not have partaken of them? The State, as a stockholder, has been confounded with the Bank of Darien as a corporation. We repeat, that it is to the latter and not the former, that the creditors must look for whatever responsibility, if any, is annexed to this transferred stock. If it has been sold and conveyed according to law, the original subscribers are released, and the *Bank of Darien*, alone, is liable. We do not decide this point. All we say is, that the *State*, as a *stockholder*, is not liable, whoever else may or may not be.

[5.] But it is said, in the *third* place, that the Act of 1841 is in the nature of a legal assignment; and that the Central Bank and its officers being the agents of the State, have mismanaged and misapplied the funds of the Bank of Darien, according to the provisions of the Act creating the trust; and that consequently, the State is liable to the creditors, to make good said waste or malversation, to the extent of the injury sustained.

Grant, for the sake of the argument, that the Act of 1841 operates as an assignment, and that the acts of the Central Bank are the acts of the State, what are the breaches of trust specified?

1st. The $16.309 01 expenses incurred in winding up the affairs of the Darien Bank. The Act makes provision for this: "All losses in cost or otherwise, in settling the affairs of the Darien Bank" are first to be deducted out of the assets. (*Cobb*, 139.) And is this not reasonable and right? And is the amount too large for collecting and paying out $241.626 52? Not an item of this sum has been singled out and assailed as excessive or wrongful. Why have not the creditors overcharged and falsified? If there is a wrong charge or an overcharge, beyond what is just, why did they not show it? We take the account stated to be correct, and the *onus probandi* is upon the creditors to show the contrary.

[6.] 2dly. It is complained, that under a resolution of the

Legislature, $12.723, the balance of the judgment recovered against John R. Anderson and his securities, as Cashier of the Branch Bank at Milledgeville, was received by the Central Bank in Darien Bank bills, when it should have been collected in current funds.

The resolution under which this money was paid, was not read on the argument. It is not published in the Digest or any of the Pamphlet Acts. And notwithstanding we devoted several days to the consideration of these claims, at the heel of the term we were unable to find this resolution. Counsel for the State and the creditors having left the Court, we were unfortunately deprived of their aid in ferreting out this and various other matters, which, in our estimation, became important to a correct and satisfactory conclusion in the cases.

Under these circumstances, we held that the same presumptions were to be made in favor of the Acts of the Legislature as of the judgments of Courts. They stand upon the same footing, in this respect. And that the resolution under which these depreciated bills were received, stood for a reason to support it. Other considerations impressed themselves upon our minds, for sustaining this transaction, to which we will advert hereafter.

After the most laborious search in the Journal of the Senate of 1849–'50, under the head, in the index, of "Reports of Committee" "on Banks," at page 253, I succeeded in finding the resolution. It seems that the securities of Anderson petitioned the Legislature for its consent to pay the residue of the $18.000 judgment recovered against them, on account of the official delinquency of their principal, in bills of the Bank of Darien, or the value of such bills at their depreciation. And the committee, "in view of the liability of the State (as a stockholder in said bank, and by reason of its bad management of its assets since the State took the control of them) while they declined recommending that the petitioners be allowed to pay the residue of the judgment in the depreciated value of the notes of the bank, concurred, nevertheless, in the justice of the alternative prayer of the petitioners,

and advised the adoption of the following resolution, which was agreed to, to-wit: the Director and Cashier of the Central Bank be authorized to receive from Wm. D. Anderson, Thos. Anderson and Rich. J. Willis, in payment of the residue of the judgment in favor of the Bank of Darien against John R. Anderson and the petitioners, bills of the Bank of Darien, *or any other claim or claims against said bank, founded on bills, at their par value*, provided the same be valid and just.

I shall be pardoned, I trust, for suggesting that sympathy for suffering securities was indulged by the Legislature in this case, at the expense of public justice. The privilege is given to discharge this debt by any counter claim against the Bank of Darien, founded on bills, such as certificates of deposit, and for which the State was clearly not liable under the XIIIth section of the charter, which restricts her liability, as a stockholder, to the ultimate redemption of "the bills or notes issued by the bank." Moreover, the committee and the Legislature were mistaken in supposing, that under this individual liability clause, the State was relieving herself of an existing obligation, by permitting this balance of $12.723 to be paid in Darien Bank bills. True, she was bound to redeem one half of the outstanding circulation. But that she had done at least *seven* years before that time. It is admitted, that as far back as 1842, she had received into the Treasury $54.180 of Darien bills. And by reference to the report of the committee on finance, at page 210 of the *Journal of the House of Representatives*, of 1847, it will be found that the amount thus redeemed by her stated to be $54.170, in that document, remained still on hand and is unpaid to this day; whereas, the outstanding circulation is only $47.342. So that when this resolution was recommended and adopted in December, 1849, so far from a duty's resting on the State, "in view of her liability as a stockholder," to receive in payment these depreciated bills, she had redeemed, at that time, $3·419 more than her share.

[7.] Shall the State, then, by reason of this piece of *legislative* "bad management," the only one which has been made

out by the proof, be held to account to the creditors for this fund? If the transaction stood by itself, we should find it difficult to defend her. But against this, we propose to set off the $25.897 96 owing by the Darien Bank to the State, and to which she is entitled to be first paid out of the assets of the bank.

[8.] This priority or prerogative right of preference in the payment of debts, constituted a branch of the Common Law of England; and as such, was adopted in this State by the Act of 1784.

[9.] It does not exist here with all the incidents to the royal prerogative right in England. We have not the writ of protection nor the extent, in chief or in aid. Here the priority of the State is a rule only in the distribution of the property of the debtor, requiring the debt due the State to be first paid, where the individual creditor has no antecedent lien overreaching it.

This privilege does not embarrass the debtor. He may alien or encumber his estate, or use it in any way which his convenience or interest may dictate. It merely regulates the rights of creditors; placing the State upon higher ground than private creditors. And as the Government is established for the good of the whole, and can only be supported by means of its revenue, ought not this revenue to be protected for the benefit of the whole?

But it may be said, that there are judgment liens here which cannot be displaced by this prerogative right belonging to the State. The judgments had no liens upon the debt recovered of Anderson for a breach of his bond. It may have been legal assets, because it could be reached by legal process; still, there was no legal lien upon it. No vested right would be disturbed by awarding the preference to this public debt.

[10.] It is argued that the State, by becoming interested with others in a banking corporation, has laid aside its sovereignty and is entitled to no privileges or preference not derived from the charter. For myself, I cannot subscribe to

the proposition. I am unable to understand how it is, that because the State takes stock, more or less, in a bank, she thereby divests herself of all the privileges which attach to her as a sovereign—as a creditor of the corporation.

[11.] As a stockholder, it is true, none of these immunities belong to her; but as a State, she occupies a very different position. And it will be found, that neither the case of *Curran vs. The State of Arkansas*, nor any of the authorities, hold that a State is disfranchised of any of her prerogative rights as a sovereign, by taking stock in a private corporation. They only go to the extent of affirming that the State, by so doing, does not impart to the corporation any of its privileges, so far as it respects the transactions of the corporation. A very different doctrine, and one with which we have no controversy.

The demand of the State, founded, in principle, as to its priority, upon *Magna Charta* itself, (*Schley's Digest*, 41,) "which was written by the property holders of the Kingdom, and signed by a conquered King, not for his private benefit, but for the public good," being double the sum alleged to have been illegally compromised by the State, the creditors cannot complain if the one be allowed to set off the other, as well as to cover other instances of bad management, not specifically enumerated or proven; more especially, as it is still an adjourned question, whether the whole amount of this recovery or some considerable portion thereof, will not have to be refunded. The securities of Mr. Anderson who paid this money, petitioned the Legislature of 1851–'2, suggesting that a large amount of the judgment was illegally obtained, and praying that the same might be refunded. And the committee to whom the subject was referred, after stating that they found some difficulty as to the precise sum which ought to be returned, *but that there was justice in the claim*, recommended the appointment of some suitable individual, by the Governor, to investigate the matter and report to the General Assembly next ensuing, what amount, if any, had been un-

justly recovered. And accordingly, a joint resolution to that effect was adopted. (*Pamphlet Acts*, 1851–'2, *p.* 571–'2.) What has been done since, if any thing, does not appear. We have learned, outside the record, that the investigation resulted unfavorably to the applicants. But it is not usual for a claim, with a legislative sanction like this, to be abandoned.

I would further remark, upon this head, that when the Government is plaintiff, it has been doubted whether any set-off will be allowed, unless authorized by special Statute; and for the same reason, that priority of payment of public debts is given, because it is necessary to enable the State to accomplish the end of its institution. (4 *Dall.* 303. 9 *Cranch.* 213, *Ib.* 313. 9 *Peters*, 319.) But the converse of this is not true, because the reason upon which the doctrine is founded does not operate.

The next and only remaining instance of mismanagement complained of is, that the State, through the Central Bank, received in Darien Bank bills, upon debts due the Darien Bank, $165.202 46, when the whole of this sum, or at least the $42.621 22 which was in judgment at the time of the assignment, should have been collected in current funds.

It is worthy of notice, at least, that throughout the whole Legislative proceedings in reference to the Darien Bank, the amount collected by the Central Bank in Darien Bank notes, is stated to be $191.904 31, instead of $165.202 46, as agreed upon by Counsel. (*See Journals of the Senate*, 1847, *and every where.*) Of the Darien bills burnt by the State, she was permitted to retain $26.000, which are still deposited in her Treasury. This sum, added to the $165.000, would make the $191.000. Was not this $26.000 collected out of the State assets, instead of those of the Darien Bank? And has she not, in fact, redeemed $80.000 instead of $50.000 of the currency of the Darien Bank?

While this discrepancy does not affect any principle involved in this decision, we deemed it of sufficient importance not to be overlooked.

By the 6th section of the repealing Act of 1841, (*Cobb*, 139,) it is provided, that "in all payments to be made on notes originally due the Darien Bank or its branches, and which shall be turned over to or renewed in the Central Bank, the maker or indorser of such note or notes shall be authorized to pay up all or any part of his or their note or notes, in bills on the Bank of Darien, issued from the bank or branch bank in which the said note or notes were originally discounted, and the Central Bank shall be bound to take such bills when so tendered."

And this was but a re-enactment of the 15th section of the Act of 1832, "more effectually to secure the solvency of all the banking institutions in this State." (*Cobb*, 100.) That "the notes and bonds hereafter made payable at and discounted by any bank, shall, when transferred to any other bank, continue payable in the bills of the bank at which they were so made payable and discounted, in the same manner and on the same principles as if they were still holden by the bank at which they were made payable, and by which they were discounted: *Provided*, that nothing therein contained shall be construed to take away from any bank any rights which are secured to it by the provisions of its charter."

The principle embodied in this law was justly considered, by the Legislature, as having a tendency to secure the solvency of our banking institutions. The Act, itself, was overlooked in the discussion; and as it will be perceived, relieves the Legislature, entirely, from the charge of having arbitrarily, by the 6th section of the Act of 1841, authorized the debtors of the Darien Bank to pay their notes in the bills of that bank. Instead of conferring the right by this Act, it was not in the power of the State to take it away, without impairing the obligation of contract. For the general law of 1832 being in force when these debts were created, the mode of payment, as prescribed by that Act, entered into and formed a part of the contract. Indeed, it is doubtful whether, upon general principles, and independently of the Act of 1832 and the 6th section of the Act of 1841, the debtors of the Darien

Bank did not possess the right of discharging their debts with the notes of the bank to which they were payable. The principle is a salutary one, and has been wisely incorporated into our system, and should be beneficially construed, as one of the many means resorted to by the State to protect the community from reckless and improvident banking. And the spirit of the law certainly, if not the letter, applies to debts already in judgment, as well as to those which were sued or still running. The only inquiry is, are these debts founded upon notes or bonds, payable at and discounted by the Bank of Darien? If so, they are, and of right should be, payable in the bills of the Darien Bank, whether in judgment or not. We believe that there is not a Statute in the Digest, having relation to monetary matters and banking, which provides so effectually for the protection and pecuniary prosperity of the people of this State.

But it is said, and the same idea is to be found in some of the reports submitted to the Legislature, all of which I have examined with the utmost care, so far as it was in my power to procure them, that by this collection in Darien Bank notes the State has been released from its liability as a stockholder, while the creditors have been deprived of the benefit of these assets, to which they had a right to look for payment. But are not the bill holders creditors? Should any other class be preferred to them? And do not these bills constitute debts against the Darien Bank that issued them; and to put which in circulation these very notes were discounted, which make up the sum total of these *assets?* Is the State, as a stockholder, primarily and originally liable for the redemption of these bills? Did she, as a State or a stockholder, flood the country with this spurious currency? I address myself to professional men, who understand the law of corporations on it is.

By the Act of 1836, amending the charter of the Monroe Rail Road Company, and conferring upon that corporation banking powers and privileges, (*Prince*, 369,) the road to be built, together with all the revenue arising therefrom, and all

the property, equipments and effects therewith connected, were pledged and bound for the redemption of the bills. And in addition to this, the persons and property of the stockholders were made individually liable for the same purpose. Under this Act, this Court did not hesitate to hold, that the bill holders had a prior lien, over-riding all other claims or contracts; and that too, notwithstanding the individual liability clause. *Collins vs. The Central Bank et al.* (1 *Kelly*, 435.) There as here, it was insisted they had two funds to look to, namely: the road and the stockholders, while the other creditors had no other resort but the road; that consequently, Equity would say to the bill holder, you shall let go the assets of the corporation, and take your pay out of the stockholders. But this Court repudiated all such ideas of equity; and acting from the highest considerations of public policy, recognised and enforced the paramount lien of the bill holder guaranteed by the Statute.

I am fully persuaded, that of all classes of bank debts, that which is most entitled to legislative care against discredit and loss, is the common currency—the circulating medium; and that in addition to the personal liability clauses which have been inserted, from that of the Darien Bank, in 1818, down to the present time, there should be superadded priority of payment out of the assets, in case of insolvency. Indeed, whether constitutional or otherwise, it would be premature to decide, but by the 3d section of the Act of 1842, passed for the purpose of winding up the affairs of the insolvent banks of the State, it is expressly provided, that the *issues* of these banks shall first be paid off and redeemed. (*Cobb's Digest*, 118.)

And yet, in the face of all this, the State has been repeatedly rebuked by legislative reports and resolutions, for allowing the debtors of the Darien Bank to pay their notes in the bills of that bank. And it is suggested as a reason, in one of these papers, why the expenses incurred by the Central Bank for its agency in settling up the business of the Darien

Bank, should not "be charged, by the State, against the creditors!" (*Senate's Journals*, 1847, *p.* 341.)

In the preamble to the Act of 22d Feb. 1850, (*Pamphlet*, 59,) it is said that many of these claims are believed to be illegal and unjust. And the director of the Central Bank was required to make inquiry concerning them; and ascertain and report to the next Legislature thereafter, upon what terms they could be compounded. We see no evidence to show that any of these claims are unjust. But we do see proofs multiplied from year to year, upon the journals of the Legislature, that the most vague and erroneous opinions have been entertained and promulgated as to the true character of the State's liability, growing out of her connection with the Bank of Darien.

In the biennial message of Governor Crawford, submitted to the General Assembly at the beginning of the session of 1845, it is stated that "the liability of the State, as a stockholder, for her proportion of the outstanding circulation of the bank, is unquestionable." Of course it is. His Excellency proceeds—"The estimated amount of this liability may not exceed sixty thousand dollars after the available assets of the bank are realized." A pledge was given, that it should be the policy of the Executive Department to effect the collection of the debts due the bank with convenient despatch, unless otherwise directed. (*Jour. of the House, pp.* 18, 19.)

In response to this message, a joint resolution was passed that session, requesting the Governor to have all the available assets of the bank collected with convenient despatch, and that he cause the same, as well as the lands, to be converted into cash so soon as, in his opinion, it could be done without manifest loss to the State, and so soon as a compliance, with good faith to the *bill holders*, shall demand; and that the proceeds be applied to the redemption of the bills of said bank, and the payment of its other legal liabilities. (*Pamphlet Laws*, 1845, *p.* 201.)

So far, all is good sense—evincing that both Departments of the Government entertained clear and correct views as to

the liability of the State as a stockholder, as well as of her duty as trustee.

In his next biennial Message, the Governor makes but slight allusion to this subject. He refers to the two suits against Anderson—the one as late cashier of the Branch of the Darien Bank at Milledgeville; and the other, as *book-keeper* of the Central Bank—and suggests, that whatever sums may be finally recovered by the action pending in *Greene County*, will be a part of the resources of the Darien Bank, and distributable among its creditors; and that the amount so recovered and paid, will, to that extent, diminish the liability of the State as a stockholder. "Of this liability," says his Excellency, "I have spoken, by my Message to the last Legislature. The opinion then expressed is unchanged." What was the liability of the State, spoken of by Governor Crawford to the last preceding Legislature? It was, that she was bound, only as a stockholder, for her proportion (one half) of "the outstanding circulation of the bank;" that the estimated amount might not exceed $60.000. And he now says, that the opinions then expressed remain unchanged; that is, both as to the nature and extent of the State's liability.

I have felt it to be my duty to be thus minute in quoting from these two messages of one of Georgia's ablest and most vigilant Chief Magistrates, because they were evidently misapprehended by the Legislature of 1847. In the report and resolutions of the committee on banks which was adopted that year, it is said, that "in the *Annual (?)* Messages of his Excellency, Gov. Crawford, in 1845 and 1847, and in the report of the committee on finance, which was assented to on the 27th of December, 1845, the liability of the State of Georgia to pay the bill holders *and creditors*, in proportion to the amount of stock held by the State in the Bank of Darien, is distinctly admitted and shown."

With the utmost deference for the committee which made this report, and the Assembly which adopted it, I respectfully submit, that injustice is done to Governor Crawford by this

statement. He did distinctly concede the liability of the State, as a stockholder, to pay the bill holders. But he never did admit that she was liable, in that character, to any other class of creditors.

What admission may have been made by the committee on finance, in their report to the House of Representatives, we know not, having searched in vain for this document. It is not in the Pamphlet Acts of 1845—neither is it to be found in the Journal of the House. We regret to find that the Journals of the Legislature are lamentably deficient in the registration of matter vitally important to the public interest. The reports of committees, whether select or standing, are rarely preserved. If accompanied with a resolution, the latter is published in the Acts, and the report omitted. Such was probably the fate of this finance report. We do not intend, by these remarks, to censure the Secretary and Clerk and their recording corps. We understand the practice originates in a principle of economy, to-wit: the protection of the State from the publication of unnecessary matter.

We do find, however, a report made that year, by the committee on Banks, in which they state, amongst other things, that they "concur with his Excellency, the Governor, that the State is liable for her proportion of the *outstanding circulation* of the Bank of Darien," but nothing farther. (*Journal of the Senate*, 1845, *p.* 172.) It is hardly to be presumed that a report differing from this, should have been made and approved during the same Session. The committee continues, "The State is *likely* to lose a large sum on account of the Bank of Darien"—much larger than this honorable committee appear to have apprehended. She had *already* sunk $325,000, by way of instalments on her capital stock; she had then in the Treasury $54,170 or 180, as the case may be, of the bills of the bank redeemed in the way of payment of taxes—an item wholly overlooked, so far as we can understand, in considering the liability of the State, from 1842 down to the present discussion. For, strange to tell, I am assured by Counsel, that in the adjustment of the State's liability, both before the

commissioners and the Circuit Court, this pregnant fact has never been brought out and relied upon. The decision of Judge HARDEMAN, making the State responsible for the whole amount of the remaining outstanding circulation, cannot be comprehended upon any other hypothesis. We do not hold it right upon that.

But the loss of the State stops not here. She gets not a dollar of her debt of $25.897 96—a debt which, by the laws of all countries, should be first paid out of the assets; and only asks, in consideration of waving this preferred claim, she may not be forced to account for the $12.723, received on the Anderson judgment in Darien Bank bills, which did not benefit her a cent, as she was not bound to redeem these bills; or at least, but a small portion of them, and is already importuned to refund the amount to the debtors, as having been illegally recovered and paid.

The committee were over-modest in *hinting* that the State was "*likely* to lose" a large sum. Computing the loss of stock, dividends, the amount expended in the redemption of bills, *et cetera*, and $500.000, the subscription price of her 5.000 shares of stock, would scarcely indemnify the State for the damage she has already sustained by this ill-starred enterprize. But the committee proceed.

"As a *stockholder*, the State is, beyond *all doubt*, in the minds of your committee, bound to pay to all *bona fide* bill holders *and creditors*, in proportion to the stock held by the State. Certain judgments have been obtained on the bank bills of the Bank of Darien, and on protested checks given by the Bank of Darien, to take up the bills of said bank. Your committee cannot perceive the difference between such judgments; they equally affect the State, and demand settlement by the State of Georgia, upon the same terms." It was again recommended to appoint a commissioner to report to the ensuing Legislature the names and classes of all creditors; and what "sum per centum" they were ready and willing to receive on final settlement. And by resolution, the

director of the Central Bank was instructed to perform th duty.

We do not feel it to be incumbent upon us to point out t difference between bank bills and checks given by the ba to redeem its bills. The one constituting the circulating m dium of the country, cannot be created without special leg lative license, and is limited in amount; whereas, agai buying and selling bills of exchange, drafts, checks, receivi money on deposit, &c. there is no legal prohibition. Suffi it to say, that for the one class of debts, it has become t universal custom of the Legislature to exact extraordina security—while for checks, &c. no such security is pro ded. But we are not here to discuss what the law ought be, but to decide what it is. Had the *Legislature* adopt the report in the form in which it was originally presented Mr. Snider, imputing to the State mismanagement in colle ing the assets of the Bank of Darien, and asserting, that *trustee*, she was, beyond all doubt, bound to pay all *bona fi* bill holders *and creditors* one half of their debts, we cou have comprehended, to say the least of it, the position inten ed to be occupied, whether maintainable or not. But wh it is gravely put forth, in a paper like this, that the State, a *stockholder*, is thus liable under the charter, we confess th we are utterly unable to understand what is meant. Su pose there be no difference on the score of abstract justi between debts due on bank bills and debts due on protest bank checks—(and I do not insist that there is)—still, if t Act of incorporation makes the State, as a stockholder, liab for the bills and not for the checks, does that constitute difference?

It is to be regretted that such doctrines should eman from such high places. It is calculated to produce confusi in the public mind—even in the professional and judic mind; and to create doubt and uncertainty as to doctrin that are as old as the history of corporations themselv And that is not all: it has excited delusive hopes and expe

sations in the minds of the creditors themselves, destined of course, to inevitable and vexatious disappointment in the end.

Had I the power, as I have said before elsewhere, I would make the law what it is erroneously supposed to be in this report, in all cases. Where the joint or corporate assets were exhausted, leaving *any debt whatever* unsatisfied, in accordance with the decision of the House of Lords, in *Dr. Salmon's case*, (*Chancery Cases*, 206–7. 23 *Charles II. Viner's Abr. Vol.* 6, *p.* 310–11.) every person of the corporation should be held liable to pay his proportion. That upon failure of corporate assets, in whole or in part, each individual member should be held liable to pay his quota or proportion of the deficiency, is a doctrine, we think, pregnant with the purest equity. Such, however, was not the law of corporations in 1818, when this bank was chartered. It is not so now; although our legislation is rapidly approximating to that point.

These are the grounds upon which the creditors propose to make the State liable for having mismanaged and misapplied the assets of the Darien Bank. After a careful examination of them, we are of the opinion that they have failed to make out such a case as will entitle them to indemnification.

The right of the creditors to the rents which accrued on the real estate, during the period the lands were controlled by the Central Bank, would seem to us to be indisputable, upon the plainest principles of justice. And that interest should be paid on the proceeds of the real estate sold in Georgia, and upon the annual rents, from the times when these sums were respectively received, would seem to follow as a necessary consequence. We are not furnished with the data which would enable us to compute the interest. All we can do, is to settle the rule, leaving the details to be adjusted by the parties themselves.

As we concur with Judge Hardeman upon this branch of the case, and the judgment which he rendered, as stated by Counsel, was, by agreement, so far as the facts are concerned, we would suggest the propriety of making it the basis of set-

tlement, as to the question of rents, unless some mistake or inaccuracy of statement has since been detected. We prescribe nothing authoritative upon this subject.

[12.] After having made common cause against the State, up to this stage of the proceeding, a cross-fire now commences between the allies themselves. The judgment creditors claim to be entitled to the whole of the available assets. The others contend for equality of right and rateable distribution.

So far as the real estate in Georgia is concerned, there can be no doubt. The judgment liens attached upon these lands in 1841, when the repealing Act was passed, and could not be divested.

[13.] Without going into an elaborate examination of this doctrine, we understand the law to be briefly this: That notwithstanding it is a favorite policy of a Court of Chancery to distribute assets equally among creditors *pari passu*, yet, whenever a judicial preference has been established, that preference is always preserved in the distribution of assets, even in that Court. (*Thompson vs. Brown and others*, 4 *Johns. Ch. Rep.* 619, *and the authorities cited in that case. McDermutt vs. Strong*, *Ib.* 687.) Whether the creditors are not all equal, as to *equitable* assets, there is a conflict of authority. In a note to *Brown vs. Brown*, (15 *Eng. Ch. R.* 275,) it is stated, that after some struggles in the Courts of Equity, upon this point, it is at length settled, that as to *equitable assets*, the creditors are all equal and are to share in proportion. Yet as to *legal assets*, it has always been held, that *execution creditors* are entitled to priority and preference.

[14.] All the available means of the Darien Bank were *legal assets*. By which, we mean such assets as may be reached by legal remedy or process, in contradistinction from the equitable interests of a debtor, which the judgment creditor must go into Equity to obtain. True, the lands in Mississippi, the only thing about which there could be any controversy, were not accessible by any legal proceeding in this State,

But so soon as they were converted into cash, by sale, the agent who held the proceeds, was subject to garnishment at the instance of the judgment creditors.

We are happy, therefore, in being able to ratify, upon legal principles, abundantly fortified by authority, the uniform course of the State in directing the whole of the available assets of the Darien Bank to be paid out to the oldest judgment creditors as fast as they come to hand.

Three points remain to be considered, before concluding this opinion:

[15.] 1st. Is the State liable for the whole or any part of the outstanding circulation? It amounts to $47.342. As early as 1842, the State had redeemed $54.180 of the bills of the Darien Bank, which, added to the $47.342 yet outstanding, would make an aggregate of $101.522, for the one half of which, amounting to $50.761, the State, as a joint and co-equal stockholder, was responsible. But she has taken up $54.180; and consequently, over paid her share by $3.419. Add to this the $12.723 received on the Anderson judgment in Darien bills, and for which she is hereby made to account to the creditors in current funds, by relinquishing a debt of $25.897 96, which was entitled to priority of payment out of the assets of the Darien Bank, and the State will have over-paid her half by $16.142. Is she, in Law or Equity, under obligation to respond further to the bill holders? Having fully expressed my views upon this point in the case of *Lane vs. Harris*, (16 *Ga. Rep.* 217,) decided at Decatur, August, 1854, I forbear to enlarge upon this point. Ample authority might be adduced in support of the opinion expressed by the majority of the Court in that case, were it deemed necessary. It is considered no longer an open question, in those States where these personal liability clauses have been the subject-matter of adjudication.

In *Tallmadge and others vs. The Fishkill Iron Company and others*, (4 *Barbour's Supreme Court Reports*, 382,) the Court say—"In either case, such limited personal liability is at an end, when the stockholder or director has paid or been

charged with debts to an equal amount. He can be required to pay the amount of his liability but once, and whether he pays that amount voluntarily, in the discharge of the debts of the corporation, or whether he is compelled to pay it upon suit brought by the corporation or any of its creditors, having paid it he can set up payment as a defence against any further liability."

That was a suit against the directors for an excess; and the charter gave the corporation a right to institute an action during its continuance; "and in the event of its dissolution, to any of the creditors thereof." The principle is the same as that involved in this case; and it was so treated and considered by the Court. Indeed, the case of *stockholders* was referred to, to illustrate the rule of recovery against the *directors*.

[16.] 2nd. Are the stockholders of the Darien Bank liable for the bills held by the administrator of James Holford, deceased?

Upwards of $200.000 of the notes of the Darien Bank, were pledged to the New York Banking Company, for the privilege of drawing upon the company through its president, J. Delafield—stipulating, in writing, that the company should be under no obligation to accept the drafts. The pledge was evidently made, therefore, without the slightest reciprocal benefit. This immense sum was thus transferred to this company, without the shadow of a consideration. And notwithstanding suit was instituted to recover these bills, a large portion of them got into circulation. It is admitted that James Holford was, in his lifetime, an innocent holder. And the only point submitted for our judgment is, is the State, as a stockholder, liable for the redemption of these bills? We think so, most clearly.

A bank note, *though stolen*, becomes the property of him who gives valuable consideration for it, having no notice or knowledge of the robbery. (1 *Burrow's Rep.* 452, *and cases cited in head note.*) So that, whether the bills got into circulation "by stupendous folly or stupendous fraud," the inno-

cent holder is entitled to collect the bills of the bank, and secondarily, of the stockholders.

[17.] 8d. Is the Milledgeville Bank entitled to recover, under the facts set out in the record, as to the package of bills upon which judgment had been obtained? We think so, provided suitable indemnity be tendered, not only for all future liability upon the original bills, but also against the past, should it turn out that these bills had already been presented and taken up by the State and burnt. (*Story on Promissory Notes*, §445. *Waters against the Planter's and State Bank, R. M. Charlton's Rep.* 193.) This last case is directly in point.

Of course the two last points are adjudged in reference and subordination to the previously expressed opinion of the Court, as to the State's general liability as a stockholder. For the bills upon which these judgments are founded, constitute a part of the $47.842, still to be redeemed by the stockholders.

In deciding between the State of Georgia and the creditors of the Bank of Darien, we have endeavored to mete out the same measure of justice to the State that we should have done had the litigation been between private citizens. We have striven to ascertain and fix, with precision, the exact legal and equitable obligation of the State. Whether she may not feel it due to herself to throw off the Statutory shield within which she is panoplied, and answer to the full expectation of these creditors, by redeeming the whole of the outstanding circulation, and discharging at least one half of the other claims, we will not undertake to advise. Upon a question of public policy, morals or magnanimity, the State is abundantly capable of deciding for herself, without the aid of our poor prompting. That the grossest misconception has prevailed, both as to the nature and extent of the State's liability as a stockholder in the Bank of Darien, is palpable and undeniable. In support of this assertion, we need only refer to the fact, that when this subject was last before the Legislature, the liability of the State to *all the bona fide creditors* and claimants was rated *at seventy-seven cents on the dollar!* (*Jour-*

nal of the House, 1854, *p.* 498.) And while it may be true, as again and again charged, that she "mismanaged" and "neglected" the assets of the bank after taking the same "by strong hand," we must say, that sufficient proof has not been submitted to us, to sustain the allegation.

Whatever the State may determine to do, we trust and believe that no stain will dim her escutcheon. While, as a Judge, I am constrained to award the judgment which we have rendered, as a tax-payer, I will cheerfully contribute my quota or proportion of any levy which the State may see fit, *voluntarily* to impose, to relieve her character for good faith, from all injurious aspersions, whether well or ill founded.

In view, then, of all the facts embraced in the seven cases between the State of Georgia and the creditors of the Darien Bank, and submitted together for the consideration of the Court—and with the distinct admission, on the part of the Counsel in behalf of the State, that the creditors are entitled to interest on the balance to be awarded to them, at least from the date of the award made by the commissioners—

It is considered and adjudged unanimously, by the Court, 1st. That no liability attaches to the State, either on account of the unpaid stock as originally subscribed, or the thirty-five hundred and sixty-seven shares subsequently transferred to the bank. 2ndly. That as trustee through the Central Bank, for winding up the affairs of the Darien Bank, the State is chargeable with available assets amounting, in the aggregate, to $241.626.52, which is to be diminished by the following credits, to wit:

Expenses,	$16.309 01
Pd. judg. in favor of Jno. G. Winter,	14.483. 60
Pd. to judgments in favor of Planters' and State Banks,	19.179 18
Darien Bank bills received as sets off against debts due the bank,	165.246
Making,	$215.

which subtracted, leaves balance due by the State, $26.408.79, with interest thereon from the date of the award made by the commissioners. For this balance, together with interest on the proceeds of the real estate sold in Georgia, and on the annual rents accruing thereon, from the times these sums were severally received, (the principal sums having been already accounted for,) the State is responsible; and it is adjudged that the same be paid to the Planter's Bank and the Bank of the State of Georgia, the oldest outstanding judgment creditors of the Bank of Darien, or their Attorney, on account of their judgments, rateably to be divided. 3rdly. As to the outstanding bills, amounting to $47.842, a majority of the Court, (Judge BENNING dissenting,) consider that inasmuch as the State has redeemed already, with the public funds, more than one half of the circulation, the State is discharged from further liability to the bill-holders. (In the opinion of Judge BENNING, the State is still liable for one half of each unredeemed bill.)

In the case of the State against the administrator of James Holford, deceased, this Court is of the opinion, and so determines, that the stockholders of the Bank of Darien, are liable, under all the facts of the case, for the redemption of the bills held by the intestate of the defendant in error. And also for the redemption of the bills which were sued on by the Bank of Milledgeville, provided suitable indemnity be tendered, not only that these bills will not again be offered for payment, but also that they have not been already taken up. This portion of the judgment, subject, of course, to be controlled by the opinion already expressed as to the respective liability of the State and the individual stockholders, for the outstanding circulation.

Finally, it is considered and adjudged, that the costs be paid in the said cases, as follows, namely, in Nos. 1 and 9, by the plaintiffs in error; and in Nos. 7, 10, 11, 12 and 13, by the defendants in error.

STARNES, J.—concurring.

There is one point of this case, in relation to which a difference of opinion exists among the members of this Court, and that is, as to the nature of the State's liability as a stockholder in the Bank of Darien, for the ultimate redemption of the bills. As we are required, by law, in the event of such a difference, to express our opinions severally, I proceed to say: That according to the view which I take of this subject, the State, as a stockholder, owning one half the capital stock, was liable to redeem one half of all the bills issued. But according to the facts before us, more than one half of the circulation has been already fairly and legally redeemed and taken up by the State. Upon the State, therefore, in my opinion, no further liability or obligation rests, by virtue of the provisions of this charter, to redeem any of the circulation still outstanding.

By this charter, and by becoming a stockholder, the State was made liable for the ultimate redemption of the bills or notes of said bank, in proportion to the amount of the value of the shares that were held by the State. (See *Sec.* 13, *Act of Incorporation*, *Prince's Dig.* 217.)

This was a liability to redeem a portion of the whole circulation, in proportion to the number and value of the shares held by the State, and not a liability to redeem a portion of each bill with reference to this proportion; and when so much of the whole circulation as was expressed by this proportion was redeemed, the State was discharged.

For the reasons of this opinion, I refer to the decisions delivered by Judge LUMPKIN and myself, in the case already cited by my brother LUMPKIN, of *Lane vs. Harris*, (16 *Geo. Rep.* 217.)

BENNING, J.—dissenting.

On one of the points common to most of these cases, I dissent from the judgment of the Court. That point is as to the nature and extent of the liability of the State, as a stockholder, to the bill holders.

The part of the charter which governs as to the point, is as follows:

"Sec. XIII. The persons and property of stockholders in said bank, shall be pledged and bound in proportion to the amount of the value of shares that each individual or company may subscribe for or hold in said bank, for the ultimate redemption of the bills or notes issued by and from said bank, in the same manner as in common commercial cases or simple actions of debt; and that the State be pledged for the ultimate redemption of the bills or notes of said bank, in proportion to the amount of the value of shares that shall or may be subscribed for and held by said State."

The meaning of this section of the charter, in the opinion of a majority of the Court, is, that each stockholder is liable for the ultimate redemption of such a part of the bills to be ultimately redeemed, as shall bear to all the bills to be so redeemed, the same proportion which the value of his stock shall bear to the value of the stock of all the stockholders; and consequently, that in redeeming his part of the bills to be redeemed, any stockholder may, at his option, select for redemption the bills held by any one bill holder in preference to those held by any other.

Now this, I think, is, in part, the meaning of the section, and, in part, not. So much of it as indicates what of each stockholder's property is the quantity bound for the redemption of bills, is, I think, a part of the true meaning. So much of it as would make it lawful for that quantity of each stockholder's property to be applied to the redemption of some bills in preference to the redemption of others, is, I think, no part of the true meaning.

The meaning of the section, in my opinion, is this:

The persons and *property* of any stockholder, are *pledged and bound* for the ultimate redemption of such a part of *any* bill as shall bear to the whole of that bill, the same proportion which the value of that stockholder's stock bears to the value of the whole stock. In my opinion, the meaning is such, that every bill holder has for *every bill* held by him, the person "*and property*" of every stockholder, to this extent, "*pledged and bound.*"

This is the opinion which I held in a case lately decided by this Court, arising under a provision similar to this, but contained in another charter, although in so holding I had also to differ from the majority of the Court. That was the case of *Lane vs. Harris*, (16 *Ga. Rep.* 248.) I must say, that after carefully studying the opinions of the majority of the Court in that case, I am but the more confirmed in my own dissentient opinion.

The objections entertained by the majority of the Court to my notion of what is the true meaning of a provision of the kind under consideration, may I think, be reduced to two: 1. That my notion is practically worthless; and 2. That it is not so accordant with the maxim, *vigilantibus non dormientibus jura subveniant* as is their notion of what is the true meaning of such a provision.

Now as to the first of these objections, suppose it were left to the creditors in these cases to say whether my notion is a practically worthless one or not?

But I cannot admit that it would be practically worthless in *any* case. Say the case is such that there are many small bills to be redeemed, and these in many different hands, and that the number of stockholders is great—what is the result? Only this: each bill holder has to collect each of his bills in small parts from each stockholder. Now is it impracticable to collect a debt because it is small? No. The difficulty of collection from stockholders in such cases, is not in *the rule.* It is in this: they set up *other* defences. But that they may do whatever the rule.

I feel confident, that I may safely say this: that if a stockholder has *no defence* of any sort against a bill, he will always gladly pay his aliquot part of it on *presentation*, knowing, as he will, that if he does not pay it then, he will have to pay it inevitably at the end of a three month's suit in a Justice's Court; and in addition to it, the costs of the suit, which may amount to many times as much as that aliquot part of the bill.

Neither can I admit that the rule which the majority of the Court think the one to be deduced from the charter, is more accordant with the maxim "*vigilantibus*," *&c.* than is the rule which I think the one to be so deduced. Indeed, it seems to me to be the merest *illusion*, to suppose that the rule of the majority will be at all promotive of the ends of that maxim. For how will that rule work? Take the case above supposed, of a great number of bills, in a great number of hands, pursuing a great number of stockholders. Add to the case, what will probably be true in every real case, viz: that a good part of the stockholders are insolvent. Now, in such a case, how will the rule of the majority work with respect to the "vigilant" creditor—the "swift" bill holder? He is the first to present his bill to a solvent stockholder. He demands payment of all that the face of the bill calls for. The stockholder replies, you demand too much. Half of the stockholders are insolvent.. I can buy the bills in any quantity at fifty cents in the dollar, but I won't give that much, for they will be lower still.

The "vigilant" bill holder has to sue the stockholder on the bill. While his suit is in progress, all the other bill holders find time to demand of the stockholder payment of their bills. He tells them the same story he had told the first applicant. They become alarmed. The "vigilant" bill holder is ahead of them with his suit. The stockholder, they know, may at his pleasure, prefer one or more of them to the others. Each bill holder at length opens his eyes to the fact that he is at the mercy of the stockholders. He makes up his mind to take what he can get. Then commences among the bill hold-

ers, a competition for the grace and favor of the solvent stockholder. The most needy bill holder offers to take the lowest price for his bills. He is chosen. The rest are rejected. The stockholder takes the bills he has thus redeemed at a few cents in the dollar, and pleads them against the pending suit of the "vigilant" bill holder. The plea is held good. The suit fails, and the "vigilant" bill holder has the costs to pay.

This is the fate to which the rule of the majority must lead the "vigilant" bill holder—the bill holder "swift" to avail himself of all his legal rights. Am I wrong, then, in saying that the rule, as a promoter of the maxim, "*vigilantibus*," *&c.* is a mere illusion? Rather, as it seems to me, is the rule a means of putting the bill holders completely in the power of the stockholders.

If, however, the rule were better calculated to promote the ends of the maxim, than is the rule which I consider the true one, still I should be constrained, myself, to adhere to the latter rule; and that for reasons which all, perhaps, fall under two heads: 1. *Equality* is equity. 2. The *words* of a Statute must govern, if they are free from ambiguity.

[1.] The rule which I think the true one, treats all bill holders as equally meritorious. It allows none to be deprived, by the rest, of his proportionate part of the property of the stockholders liable to be applied to the redemption of the bills. And in this, it is in strict harmony with almost all the other parts of the law applicable to cases analogous to this case. In proof of this, I merely refer to what is to be found on the subject in my aforesaid opinion in *Lane vs. Harris*. In short, the rule does homage to the maxim, *equality* is equity.

[2.] But more and better. The rule, as I think, does homage to the *naked language* of the law—to the *plain words* of the charter.

This, as we have seen, is the language of the charter:—"The persons and property of stockholders, shall be pledged and bound," &c. "for the ultimate redemption of the bills or notes issued by and from said bank," &c. Now, "*the bills or*

notes," is an expression that cannot but mean *all* the bills or notes. That being so then, the *property* of the stockholders is *pledged* and *bound* for the redemption of *all* the bills or notes. This is what the words plainly say. How, then, can this property, thus *pledged* and *bound* to the payment of *all* the bills, be diverted from its purpose of securing the payment of all, and applied to the payment of only a part? I see not how it can be done in the face of these words. Suppose that all the stockholders had made to all the bill holders a mortgage or some other security, couched in the terms of this charter, could, in that case, any one bill holder, let him exercise what "vigilance" or diligence he might, convert that mortgage wholly to his own use? Could any one bill holder, by being the first to sue, deprive the other bill holders of their *legal rights* under the mortgage? Is there any one who will say so? But in what does that case differ from the real case? It seems to me, that it does not differ from the real case in any essential particular.

It follows, that in my opinion, the State, as it owns one half of the stock, ought to pay fifty per cent. of each outstanding bill.

No. 13.—JOHN W. WALKER and others, plaintiffs in error, *vs.* HENRY P. WOOTTEN and another, administrators, &c. defendants in error.

[1.] The defendant to a bill, after answering the bill, dies. His representatives are made parties, and they file pleas in bar, and the pleas and answer are allowed and ordered "to stand for a hearing at the final trial." At a subsequent term, the plaintiffs move to dismiss the pleas on two grounds: First, that the deceased party had answered and filed no pleas. Secondly, that the pleas were not sworn to: *Held*, that the motion was properly overruled.

[2.] If, on a settlement between trustee and *cestui que trust*, the trustee tell the *cestui que trust* that he owes him nothing more, the Statute of Limitations begins, from that moment, to run in favor of the trustee.

[3.] An administrator, after a settlement with the distributees, makes a return to the Court of Ordinary, in which he states matters occurring before the settlement, and the payments made at the settlement, but states nothing occurring afterwards: *Held*, that this return is not sufficient to take the case out of the Statute of Limitations, which had begun to run in favor of the administrator from the time of the settlement.

[4.] The party that seeks to open the settlement of an account, has upon him the burden of showing error in the settlement, and error resulting from accident or mistake, or the fraud of the other party.

[5.] It is not error in the Court, in charging the Jury, to assume as true what is admitted by the parties to be true.

In Equity, in Wilkes Superior Court. Tried before Judge ANDREWS, March Term, 1855.

In 1823, William Walker died, and Thomas Wootten was appointed administrator upon his estate, consisting of lands, slaves, &c. Walker left three children and a widow. One of the children died before his arrival at age, and administration was taken on his estate. John W. Walker, and Merriwether T. Walker, the remaining children, in 1847, filed a bill against Thomas Wootten, as administrator, for an account and settlement. To this bill, Thomas Wootten answered, denying that he had any more in his hands, and setting forth receipts of one of the complainants, and of the guardian of the other, he being a minor until within a year before the filing of this bill. Pending the suit, Thomas Wootten died, and Henry P. Wootten and another, were appointed his administrators, and as such, made parties to this bill. They filed two pleas to this bill: *one* setting forth a settlement with one of complainants and the guardian of the other; and the *other*, a plea of the Statute of Limitations. The following are copies of the receipts relied on:

"Received of Thomas Wootten, adm'r of William Walker and John Walker, dec'd, the sum of Seven Hundred and

Forty-six Dollars and Forty Cents, as part of my distributive share of the estate of said estate, this 29th Dec. 1838.

(Signed,) MERRIWETHER T. WALKER.

"Received of Thomas Wootten, adm'r of John Walker and William Walker, dec'd, the sum of Seven Hundred and Twenty-six $\frac{84}{100}$ Dollars, which appears from a settlement I have this day made in full of the distributive share of William Walker, a son of William Walker, dec'd, in said estate. This settlement subject to the revision, if he thinks proper, of Robert Walker, guardian of said William Walker. January 23rd, 1840.

(Signed,) ROBERT TOOMBS,
Att'y for Rob't Walker, as aforesaid."

At a subsequent term, an order was taken, "that the plea and answer be allowed, and that said plea and answer stand for a hearing at the final trial of the cause."

At the March Term, 1855, when this cause was ready for trial, the Solicitors for complainant moved to strike out the said pleas—1st. Because the original defendant, Thomas Wootten, had answered in full, without entering these pleas. 2nd. Because the defendants had not complied with the rules of Equity as to amendments to sworn answers. The Court over-ruled the motion, and complainants excepted.

The complainants then filed a replication to these pleas and answer, admitting that there had been a settlement, but alleging, generally, fraud, accident and mistake therein; and especially, that in 1846, the administrator, Thomas Wootten, made a return to the Ordinary, as administrator, which return was the first notice complainants had of the credits there claimed by the administrator; and that said return showed large amounts against the administrator.

It was admitted on the trial, that the administrator upon the estate of the deceased child, never received any part of his estate.

The complainants put in evidence the return of 1846, which appears to be a return of the acts of the administrator, prior to the alleged settlement in 1840, and not returned till 1846.

The following evidence was then offered by defendants:

John H. Dyson, at the request of Thomas Wootten, assisted Mr. Toombs, (who was then Attorney for complainants,) in 1840, in making a calculation and settlement upon the said estate. He made the calculation, and *and all the vouchers returned in the return of* 1846 were before him at the time. Commissions were allowed the administrator, though he had not made regular returns. The receipt given by Mr. Toombs, was subject to the ratification of the guardian, but the administrator denied owing anything more. It appeared that M. T. Walker had been been overpaid $20.

Robert Toombs confirmed this evidence; and farther, that he notified his clients that the administrator denied owing anything more.

The complainants, in rebuttal, proved by *Robert Walker*, that he was astonished at the result when notified by Col. Toombs. Was not satisfied; but did not know how he could correct it, not seeing any returns.

The Court charged the Jury, "that the Statute of Limitations ran from the settlement of 1840, notwithstanding the return of 1846, unless there was something disclosed by that return which was concealed in the settlement, material to the rights of complainants. That whether the Statute commenced running at the time of settlement, depended on the disclaimer of the administrator, Wootten, to owe the complainant anything more; and that such disclaimer was a continued adverse holding, until he might, in some form, subsequently retract or admit his trusteeship. That though the return of 1846 might show, according to calculation, a balance against Wootten, as administrator, that would not avoid the operation of the Statute, as the running of the Statute depended on the disclaimer of the administrator and notice to the complain-

ants, and not the state of the account, though the balance might have been against him.

That the simple return of 1846, was not a resumption of the trust, unless it disclosed that the administrator had done some act since the settlement of 1840. That the simple return and recording of his acts up to the settlement, and of the settlement itself, were no resumptions of the trust. The Court further charged, that the Statute of Limitation did not bar John W. Walker, if the Jury believe, from the proof, that he came of age within four years of the filing of complainants' bill.

The Court further charged, that this case came up differently from ordinary bills for account. In this case, the defendants having relied on and proven a settlement, and complainants having replied thereto, it was incumbent on them to prove their replication, they holding the affirmative of the issue; and unless the settlement could be shown to be wrong, it would be a complete bar to complainants' case. That said settlement could not be proven to be wrong by simply showing from a calculation of all the returns, that such calculation differed from the settlement of 1840. That it must be shown that the settlement was made on an incorrect data—that some material facts were concealed; or it must be attacked upon some ground other than disagreement with a subsequent calculation. That the parties had a right to concede, and may have conceded, some of their legal rights in the settlement. That they may have had other proof before them than what now appears.

The Court charged, according to the state of the pleadings, it was incumbent on the defendants to show that there was administration on the estate of James Walker, brother of complainant; otherwise, they were entitled to take into this bill the portion of the estate of William Walker, the portion coming to said James, as one of his distributees. But if it was satisfactorily proven to the Jury, that there was administration on the estate of said James Walker, then complainants had

no right, under this bill, to claim any portion of said James' estate, but must look to his administrator.

To all of which charge complainants excepted, and have assigned error thereon.

H. & G. J. GREEN, for plaintiffs in error.

TOOMBS, for defendants in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] The motion to dismiss the pleas was properly overruled.

When the representative of a deceased party to a suit, succeeds to that party's place in the suit, he, of course, succeeds to that party's rights. Whatever pleas, therefore, Thomas Wootten could have filed, if he had not died, his administrators after, they succeeded to his place, could equally file.

The other ground assigned for the motion, that the pleas were not sworn to, might, perhaps, have been sufficient, had the motion been made earlier. But the motion not having been made until the lapse of a term or more after the Court had ordered that the plea and answer should be allowed and should stand for a hearing at the final trial of the cause, this ground was not sufficient.

Besides, had the motion been sustained and the pleas dismissed, the defendants would, under the Amendment Act of 1854, have been allowed, forthwith, to insert in their answers the matter contained in the dismissed pleas. So, the only question was, whether the matters stated in the pleas should be stated in the form of a plea or in that of an answer?

[2.] The charge of the Court as to the time when the Statute of Limitations *commenced* to run in favor of Thomas Wootten, is supported by three decisions of this Court. (*Scott vs. Haddock and Wife*, 11 *Ga.* 258. *Morgan vs. Morgan*, 10 *Ga.* 297. *Keaton vs. Greenwood*, 8 *Ga.* 97.)

It seems that six or eight years after the settlement be-

tween Thomas Wootten, as administrator, and the complainants, he made a return to the Court of Ordinary. The return, however, according to the evidence, contained nothing which was not taken into the account at the time of the settlement—nothing which happened afterwards. In respect to this point, the charge of the Court, in substance was, that the fact that this return was made after the settlement, did not amount to an admission sufficient to take the case out of the Statute of Limitations. And we think the charge was right.

[3.] It was the duty of the administrator to return all of his actings and doings, (including the payments on final settlement,) to the Court of Ordinary. How could he return these payments until after they were made; that is, until after the final settlement? And as a matter of course, the return, when made, would have to include all matters occurring before the settlement and after the last previous return. Is such a return to be construed into an admission, that he still has in his hands assets—an admission, that he ceases to stand upon the rights which he obtained by the settlement? Certainly not.

One of the pleas in bar of the defendants, was a settlement in full between their intestate and the complainants. To this plea, the complainants replied, admitting the settlement but insisting in general terms, that there had been "fraud, accident and mistake" in the settlement. They stated no particulars of fraud, of accident, or of mistake.

In support of this part of the replication, the complainants relied solely upon the return made by the administrator, subsequently to the settlement; which showed, as they insisted, more to have been due to them than they obtained in the settlement; and therefore showed, as they argued, that there must have been some fraud, accident or mistake in the settlement.

[4.] The Court's charge on this point, in effect, was, that the settlement was not to be set aside or opened, although a calculation made from the naked return, might show in favor of the complainants a larger balance than the amount they received in the settlement. And in this we think the Court was right.

For, first, there was no evidence to show that all the mat ters which entered into the settlement, appeared on the fac of the return. There was no evidence to show that the par ties settled at all by the return. On the contrary, there wa evidence to show that they could not have settled, in whol or in part, by the return; for there was evidence, that abou six years had elapsed after the settlement before the retur was made. And in such a case, if an error exists, it is a least as likely that it will be found to be in the return as i the settlement. Secondly, there was no evidence to show th difference between the balance deducible from the face of th return, and the amount paid over by the administrator, no to have been known to both sides; and so, no evidence t show that difference not to have been itself taken into consid eration in the settlement; that is to say, there was nothin to show accident or mistake, or the fraud of the administrato to have been the reason why the amount paid over, was ne as great as, judging from the face of the return, it ought to hav been; and to open the settlement of an account, there is upon the party who seeks to open it, a burden, to show no only an error but an error resulting from accident or mistake or the fraud of the opposite party. (*Story's Eq. Jur.* §527. Errors known to both sides at the time of a settlement betwee them, cannot, by either, be made a ground for opening th settlement.

The facts of this case being such as they were, it was no wrong in the Court to use, in the charge, the language, "th defendant having relied on and proven a settlement," &c The question, whether there had been a settlement, was no in issue. That there had been one, was expressly *admitte* by the complainants in their replication. To set it aside o to open it, was all they sought to have effected.

So, we think the decisions of the Court below ought to b affirmed.

In conclusion, I may remark, that in strictness, the ques tion, whether there was an error in the settlement occasione by fraud, accident or mistake, was not in issue. This ques

tion was raised, not in the bill, but in the *replication;* and being only in the replication, the defendant could neither answer it yea nor nay. A replication puts in issue what is contained in the answer—not new matter which is contained in the replication itself. But, indeed, such a replication as this is perfectly anomalous.

No. 14.—SAMUEL HUNTER, guardian, &c. plaintiff in error, *vs.* NATHAN BASS, executor, &c. defendant in error. THE AMERICAN COLONIZATION SOCIETY, plaintiff in error, *vs.* NATHAN BASS, executor, defendant in error.

[1.] A will has provisions for the emancipation of certain slaves, which provisions are void. It has other provisions. The executor prays the direction of a Court of Equity, as to how he shall execute these latter provisions. In virtue of the void provisions, the Colonization Society, on its own account, applies to be made a party in the case, as also does one H, as guardian *ad litem* for the slaves. The Court refuses the applications: *Held*, that the Court did right.

In Equity, in Putnam Superior Court. Decisions by Judge HARDEMAN, March Term, 1855.

Robert Bledsoe, by his will, directed his executors to dispose of his negroes, as follows:

"I will and desire that there shall be a sufficiency of good, arable land, purchased either in the State of *Indiana or Illinois*, for all my negroes to locate upon and cultivate, with a sufficiency of land for timber and firewood included—to be done within a reasonable time after my death, by my executors or any one or two of them; and to remove all of said negroes to said tract or settlement of land, in the State of Indiana or Illinois, as aforesaid; but would recommend for the title to

said land to be made to my executors, for fear they might be defrauded out of the land or squander it themselves.

"I will and desire, after the removal and location of said negroes *west of the Ohio river*, that they be furnished an outfit of farming utensils, including the wagons and teams used in their removal as a part of said outfit; and further request that there be also purchased for said negroes the first year's provisions for their subsistence after their removal."

After the making of the will, and before the death of Bledsoe, the State of Indiana prohibited the introduction of negroes into that State. After his death, the State of Illinois passed a similar Act.

Nathan Bass, the executor to this will, filed a bill for direction, stating, that by this state of facts, the will of Gen. Bledsoe could not be executed—and asking direction whether the negroes passed under the residuary clause or went to the next of kin.

Hunter moved to be made a party to this bill as guardian *ad litem* for the negroes, and to represent their interest.

The American Colonization Society also moved, by Counsel, to be made a party, calling the attention of the Court to the Colony of Liberia as a proper location for the slaves, and tendering their organization as a proper scheme for carrying out the charitable bequests of the testator.

The Court below refused both applications, and error is assigned thereon.

B. HILL, T. R. R. COBB and H. COBB, for plaintiff.

E. A. NISBET; F. H. CONE, for defendant.

By the Court.—BENNING, J. delivering the opinion.

[1.] In the opinion of this Court, the decision of the Court below, in each of these cases, was right.

It may be said, with confidence, that the testator wished his slaves to be free in the State of Indiana or the State of

Illinois. But it cannot be said, with any degree of confidence, that he wished them to be free in Ohio or Massachusetts, Canada or Congo, Liberia or wherever else his executor or some Court might say.

The will, therefore, is not one which can be executed according to the doctrine of *Cypres*.

The reasons why we think this will not to be saved by the doctrine of *Cypres*, will doubtless be stated at some length in the opinion of the Court in the next two cases, which are upon the same will.

And if the will cannot be executed according to the doctrine of *Cypres*, it cannot be executed at all—for the States of Indiana and Illinois have forbidden the introduction of negroes into their respective limits.

But if the will cannot be executed at all, as far as it concerns emancipation, then the slaves take no rights under it. And if the slaves take no rights under it, then none on behalf of the slaves do, or on behalf of the slaves can, appear in Court on pretence of representing the rights of the slaves.

The Court was right, therefore, in refusing to let the Colonization Society or Hunter become parties in the case.

The Court was right in this for another reason. Even if the will were one to be executed, *Cypres* the *executor*, would be a party all sufficient to execute it.

And I may say, for myself, that I think the Court was right for still another reason. I think the whole will was void under the Acts of 1801 and 1818. Why I think so I will state in delivering my opinion in the next two cases.

In these two cases I will only add, that in my opinion, the monstrous doctrine of *Cypres* is not to have given it one inch of ground beyond the *possessio pedis*.

No. 15.—DAVID R. ADAMS, guardian, &c. plaintiff in error, *vs.* NATHAN BASS, executor, &c. defendant in error. NATHAN BASS, executor, &c. plaintiff in error, *vs.* FELIX LAFORCE, *et al.* defendants in error.

[1.] B by his will, directed that a sufficiency of good, arable land should be purchased, either in the State of Indiana or Illinois, for all of his negroes to locate upon and cultivate, with a sufficiency of land for timber and fire-wood included—to be done within a reasonable time after his death, by his executors or any one or two of them; and to remove all of said negroes to said tract or settlement of land, in the State of Indiana or Illinois, as aforesaid; recommending the titles to said land to be made to his executors in trust for the use of said negroes, for fear they might be defrauded out of the land, or squander it. The testator further directed, that after the removal and location of his negroes in their new home, that an outfit of farming utensils be purchased for them, including the wagons and teams used in their removal: and that a year's provision be found for their subsistence: *Held*, that as the intention of the testator could not be literally fulfilled; (the State of Indiana prohibiting, by her Constitution and Laws, and the State of Illinois by Statute, the introduction of negroes into these States,) nor the will executed upon the doctrine of Cypres, which does not prevail to the same extent in this State that it does in England; that the testator died intestate as to his slaves, and that a trust resulted for the heirs at law or next of kin.

[2.] Where the testator, by his will, directs the whole of his estate, real and personal, to be sold, except his negroes, and after defraying the expenses of the removal and settlement of his slaves in certain free States, the *balance* of the proceeds to be vested in bank stock for the use of his nephews and nieces, and the clause as to the slaves could not be executed: *Held*, that the testator constituted his nephews and nieces residuary legatees, not of his entire estate, so as to take the slaves on account of the invalid disposition as to them, but of the proceeds of the property directed to be sold, and in part appropriated to other objects.

[3.] Where a testator directed his estate to be sold by his executors, and that after the removal, location and outfit of his negroes in Indiana or Illinois should be defrayed out of it, the balance of the proceeds to be vested in State bank stock by his executors, and the dividends thereon be equally divided as they should be declared, between his nephews and nieces, without limitation of time, and without making further disposition of said fund: *Held*, that this is a bequest of the *principal* as well as the interest, and that the whole vests absolutely and at once in the legatees: *Held further*, that it is optional with the legatees to elect to take either the property itself, its proceeds, or the bank stock in which the money arising from the sale was directed to be invested.

In Equity, in Putnam Superior Court. Tried before Judge HARDEMAN, March Term, 1855.

Robert Bledsoe died, leaving the following last will and testament, which was admitted to probate:

STATE OF GEORGIA,
PUTNAM COUNTY.

In the name of God, Amen: I, Robert Bledsoe, knowing the uncertainccy of life, and being now of sound and disposing mind and memory, do make and publish this, my last will and testament, as follows:

Item 1*st*.—I do hereby ordain, and constitute, and appoint, the Honorable Wilson Lumpkin, William Turner and Nathan Bass, of Georgia, and Walter Bullock and Garnett Watts of Kentucky, executors to this, my last will and testament.

Item 2*nd*.—I will and desire, that at an early period after my death, my grave be wattled in with hewn rock and covered with a marble slab, and my birth, (March 31, 1783,) as well as my death, be inscribed thereon and enclosed with an iron railing.

Item 3*d*.—I will and desire, that there shall be a sufficiency of good, arable land purchased, either in the State of Indiana or Illinois, for all my negroes to locate upon and cultivate, with a sufficiency of land for timber and firewood included; to be done within a reasonable time after my death by my executors or any one or two of them, and to remove all of said negroes to said tract or settlement of land in the State of Indiana or Illinois as aforesaid; but would recommend for the title to said land to be made to my executors, for fear they might be defrauded out of the land, or squander it themselves.

Item 4. I will and desire, after the removal and location of said negroes west of the Ohio river, that they be furnished an outfit of farming utensils, including wagons and teams used in their removal, as a part of said outfit; and further

request, that there be also purchased for said negroes, the first year's provision for their subsistence after their removal.

Item 5.—I will and desire, that all my lands and landed property shall be sold on a credit of one and two years, titles to be made on the payment of the last of the purchase money, besides good personal securities; and I further desire, that the stock of horses, mules, cattle, sheep, hogs, crop of corn, &c. the household and kitchen furniture, and farming utensils, to be sold on a credit of twelve months, for notes with approved securities. I also desire, if there be a growing crop of cotton, for it to be completed for market, or a crop of cotton already on hand, ginned and packed, that said cotton shall be sold in Savannah or elsewhere, at private sale for cash, or even any other of the property of said estate which is designed to be sold, may be disposed of at private sale, provided a full and fair price or prices shall be obtained, either for cash in hand or on time, with the like securities mentioned above.

Item 6.—I will and desire, after the removal, location and outfit for my negroes shall have been completed in the State of Indiana or Illinois as aforesaid, that the balance or residue of the proceeds of my property shall be vested, by my executors, in stock of State Bank of Georgia, and whenever the dividends or profits of said bank stock shall be declared by said bank officers or their authority, that said dividends or profits shall be equally divided, year after year, between my nephews and nieces, the children of my late brothers, Richard Bledsoe, dec'd, and Jesse Bledsoe, dec'd, the former leaving three children, who I believe, reside in Missouri, and the latter, leaving two children, who reside in Georgia; my niece, Mary Frazer, daughter of the late Dr. Robert Frazer, is amply provided for if the property and money have not been wasted, and it being doubtful whether she is now in life from the last accounts of her bad health, I therefore leave her out of this bequest.

My object in [illegible] the investment to be made in bank stock, is that said nephews and nieces shall receive the profits

ally or semi-annually, according to the bank regulations; fore, said legatees are not authorized, individually or ctively, to dispose of their interest in said bank stock; manifestations directly or indirectly amounting to a de- tration of a disposition on the part of any one or more id latter legatees to change the order or object of this, ast will, it shall work an entire forfeiture of said interest terests in said estate, and thereby wholly change into a fund for the use and benefit of the poor people of the ty of Putnam, so far as the interest or interests of said ews and nieces designated in the bequest.

testimony whereof, I, Robert Bledsoe, testator as afore- hath hereunto set my hand and affixed my seal, the 17th ast, 1846. Signed, published and signed in the presence

: JUNIUS A. WINGFIELD,
S. A. WALES,
ROBERT F. TRIPPE,
JAS. NICHOLSON, J.I.C. ROBERT BLEDSOE, [L.S.]

athan Bass qualified as executor under this will. Subse- tly, he filed a bill for direction, stating that the State of ana, prior to the death of General Bledsoe, and the State linois, subsequent to his death, had passed laws prohibit- he introduction of negroes into either of those States; it was impossible, therefore, to execute that portion of vill—and he submitted, whether, as to the negroes, the tor died intestate, or whether they pass under the resid- clause in the will? That one of the nephews of testator died since the death of testator, leaving a widow and ren—and he submitted, whether the trust continued, as em? Upon these and all questions arising under the he asked direction.

pon the hearing the Court decided, 1st. That the clause ference to the negroes was not void under the Acts of and 1818; and that it could be carried into effect by

the negroes being sent to some other State or Territory, west or north-west of the Ohio river.

To this decision Counsel for the residuary legatees excepted, and have assigned error thereon.

The Court decided, that if the negroes and the provision for them fell back into the estate, they would not pass under the residuary clause, but there would be an intestacy as to this property. To this decision the executor excepted.

The Court also decided, that as the dividends of the bank stock were given absolutely to the residuary legatees forever, that the *corpus* also passed to them immediately. To this decision the executor excepted.

Upon these exceptions the executor assigned error.

ADAMS; DIOMITARI; J. WINGFIELD and CONE, for legatees.

E. A. NISBET, for the executor.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The testator has directed that there shall be a sufficiency of good, arable land purchased, either in the States of Indiana or Illinois, for all of his negroes to locate upon and cultivate, with a sufficiency of land for timber and firewood included; to be done within a reasonable time after his death, by his executors, or any one or two of them; and to remove all of said negroes to said tract or settlement of land in the aforesaid States. And recommends that the title to the land so bought be made to the executors, for fear the slaves should squander or be defrauded out of it.

He further directs, that after the removal and location of his negroes, that there be purchased for them an outfit of farming utensils, including the wagons and teams used in their removal as a part of said outfit. And lastly, he requests that a year's provision be supplied for the subsistence of the negroes, after their removal and settlement.

appears that Indiana, by her Constitution and laws, and is, by Statute, have prohibited, under severe pains and ties, the introduction of negroes into either of those s—the former *before* and the latter *subsequent* to the of the testator.

Can this bequest in the will, as to the negroes, be carnto execution? Of course it cannot be, according to xpressed wish of the testator. And that, alone, would to be, as it ought to be, conclusive of the case. But ourts of Great Britain, and to some extent of this country, ber wisely or unwisely, reasonably or otherwise, have i it upon themselves, under certain circumstances, to rm a most delicate and responsible office; that is, to another will for the testator, where his declared intenecessarily fails. However revolting this doctrine may common sense or repugnant to our own sense of right, re content to administer it, for the present at least, notstanding Lord *Kenyon*, Lord *Eldon*, Lord *Denman* and blest of the English and American Judges have repro- l it in the strongest language.

ter carefully examining the *Cypres* doctrine, as estab- d in the text books as well as the adjudicated cases, we aclined to adopt the principle as stated by Sir *James ram*. He says the meaning of it is now sufficiently unood, "In order to preserve and effect something which Court collects from the will, to have been the paramount t of the testator, it rejects something else which is reed as merely a subordinate purpose, namely: the mode rrying out that paramount intention." *Vanderplanck vs.* , (3 *Hare*, 11, 12.)

t us apply this rule of approximation to this testament. it be collected from the will, that the paramount object e testator was to give freedom to his negroes, and that ana and Illinois were selected only as the mode of carryut that paramount purpose? We may conjecture so, cially as to substitute some other State or Territory hwest of the Ohio would be but a slight alteration of that

which is directed, but which cannot be performed. But the testator has not said so, and neither this nor any other Court can undertake to determine, judicially, what would have been his will provided he had foreseen what has happened. I might be willing to have my sons educated at Princeton College; and yet, prefer that the whole of them, were they numerous as the progeny of old Priam, should grow up in ignorance of the alphabet, rather than they should be taught at Yale. Still, these institutions are within less than a day's journey of each other.

General Bledsoe was a large landed proprietor in Indiana and Illinois, and had often visited those States. He is known to have entertained the most inveterate hostility to the neighboring State of Ohio. The differences which existed between the two former and every other north-western State may have constituted the sole motive with the testator for making the disposition which he did of his slaves. I do not pretend to say that this was so. It is sufficient that it may have been. Speaking for the last time by his last will, and without manifesting, by a single syllable, any general intent to manumit his slaves, and without once using the words "freedom," "emancipation" or any other term indicative, that any such object was uppermost in his mind, his sole and definite proposition is to have his negroes removed to Indiana or Illinois, and located on land to be bought for them there. Liberty, of course, would be the necessary terms of this disposition; and such, unquestionably, was contemplated by the testator. But to hold that he would have conferred the same boon, taking all the risks and disadvantages attendant on the change, anywhere else, is to assume what is incapable of proof. Upon this subject, he has not spoken and must remain silent forever; and we must be satisfied to continue ignorant of his wishes, further than he has seen fit to reveal them. All beyond is *terra ignota*, mere vague surmise, upon which we dare not act.

Had the testator directed his negroes to be manumitted in some place where they could, by law, enjoy this real or *ima-*

ginary blessing, and there stopped, his will might have been executed; certainly it could have been in England by the King as *parens patriæ;* and upon the information of the Attorney General, a scheme would have been devised for this purpose. Had he declared a general intent to free his slaves, and given specific directions for its execution, which could not be carried out, as in the present instance, still a Court of Chancery would execute the general intent as nearly as possible, in some other way. But I repeat, that here no such general purpose is manifested; but a precise disposition made upon the testator's own plan. The Courts, in such case, cannot execute the will *Cypres;* because the testator having declared a clear and intelligible purpose, and nothing more, that purpose, and none other, *is his will.* (*Adams' Equity*, 197, 1 *Spencer's Eq. Jur.* 532.)

Believing, as we do, that this doctrine has been misunderstood and misapplied, and it being the opinion of some, that the Courts are bound to devise some scheme to prevent the failure of a bequest of this sort, we will submit another familiar illustration. A testator in this State appropriates ten thousand dollars for the erection of a Presbyterian Church, and says no more. Here, the object being specified with sufficient certainty, the intention of the testator will be effectuated, notwithstanding he has omitted to designate the place which is to be the recipient of his bounty. The Courts will apply that defect rather than the charity shall miscarry. So, if the testator sets apart, by his will, ten thousand dollars for the building of a Presbyterian Church within the bounds of Hopewell Presbytery, and mentions Augusta as a suitable location, but no lot can be procured in that city for the purpose, here, no doubt another site might be chosen as within the plan of the testator, and the church would be decreed to be built at Macon or some other place. But suppose the testator should simply direct his executors to erect a Presbyterian Church at Milledgeville, the seat of Government, at a cost of ten thousand dollars, and the civil authorities should

refuse to allow it, or it should fail from any other cause. In that event, the Courts could not presume that the general idea of benevolence, in propagating the gospel, was foremost with the testator, and that the particular spot specified was merely illustrative; but they would be bound to hold that the individual purpose mentioned, was the only one in the testator's mind, and that if it should fail, he intended the property to go to his next of kin or heirs at law. And there is no equity to alter this disposition.

In the case, then, before us, as the design of the testator respecting his negroes cannot be accomplished, and the Courts are powerless to intervene, the slaves must descend to and be distributed amongst the heirs at law of the decedent.

As to the idea that these negroes go to the nephews and nieces, as residuary legatee, to my mind nothing can be clearer. I am aware that the English law goes far to favor the residuary legatees, because there the undevised residuum went to the executor. But no such reason exists here. The nephews and nieces may be properly called, under this will, partial residuary legatees, and that of a particular fund. There are no words going before or following after, to which the term "*balance*" can have relation, which would justify the conclusion, that it meant a residuum of the whole estate. It would be a great stretch of interpretation to say, that slaves are comprehended in "the balance of the proceeds of the sales," when the very sale was mainly for their benefit. To say that the slaves compose a part of the residue when the larger portion of that very residue is given for the use of the slaves themselves, would be manifestly absurd. Had the testator used the words, "the *balance* of his estate" or any other of equivalent import, the slaves might have passed under it. But we cannot interpolate words into a will; and without such interpolation, we think the slaves pass to the next of kin. (2 *Roper on Leg.* 182, 437–8. 1 *Hill's Ch. Rep.* 95. 1 *P. Wms.* 40. *Dev. and Batt. Eq.* 491.)

I will only add that, as a man, I do not regret the failure of this bequest. Look at the stringency of the laws of In-

diana and Illinois and other Northwestern States, against persons of color, and reflect upon their thriftlessness, when not controlled by superior intelligence and forethought, and what friend of the African or of humanity, would desire to see these children of the sun, who luxuriate in a tropical climate and perish with cold in higher latitudes, brought in close contact and competition with the hardy and industrious population which teem in the territory northwest of the Ohio, and who loathe negroes as they would so many lepers? Courts should not be astute in so construing wills as to doom them to such a destiny. A stern and inexorable State policy equally forbids it. (*See Bryan vs. Walton*, 14 *Ga. Rep.* 185, 206.) As to the transportation of these slaves to Liberia, the wildest and most latitudinous application of the *Cypres doctrine*, could never, *under this will*, justify such a project as that.

[2.] For the purpose of carrying into effect the bequest in the will which we have been considering, the testator directed the whole of his estate, real and personal, to be sold; and after the removal, location and outfit for his negroes should have been completed in the State of Indiana or Illinois, the balance or residuum of the proceeds of his property to be vested, by his executors, in the stock of the State Bank of Georgia; and that whenever the dividends should be declared, the same should be divided between his nephews and nieces, the children of his late brothers, Richard Bledsoe and Jesse Bledsoe, deceased. The testator gave as a reason for wishing this investment made in bank stock, that his nephews and nieces might enjoy the periodical profits without having authority, individually or collectively, to dispose of their interest in said stocks.

An important question arises upon this will, wholely overlooked in the argument. The point was fully and ably discussed at bar, whether the bequest as to the negroes being void, they would go to the legatees or descend to the heirs. But as no portion of the proceeds of the property is needed,

for the slaves, what is to become of that fund? Does that go to the legatees or the heirs?

In the opinion of this Court, the whole goes to the legatees, not as a residuum, but by the express terms of the will. It is true that the *balance*, only, of this fund is given. But this balance is indefinite, being dependent entirely upon the amount needed for the negroes. Still, it is the entire balance, be it more or less. If it took nine-tenths or ninety-nine-hundredths of this fund to colonize the slaves in Indiana or Illinois, what was left only was bequeathed to the nephews and nieces. And we apprehend the converse of this proposition is equally true, namely: that if none be needed for this purpose, the legatees take all.

Suppose the gift of this fund had been made in another form; that is, subject to be diminished by so much as would be required to remove, locate and furnish the negroes for twelve months in their new home. Is it not clear that in that case the legatees would take the whole—and are not the two cases substantially the same?

Had the testator bequeathed a definite portion to the legatees, namely: two-thirds or three-fourths, to be applied to the use of the slaves and the remaining one-third or one-fourth to be vested in bank stock for his nephews and nieces, it would be plain that, *as legatees*, they could take no more; and not only the negroes, but so much of the monied estate as was appropriated to their benefit, would go to the heirs at law.

It is plain, therefore, that the nephews and nieces are residuary legatees, if you please, not of the estate, but only of the proceeds of the property directed to be sold, and in part appropriated to other objects; the word *balance*, having reference to what remains of the proceeds of the sale after paying certain charges and expenses, and not to any general residuum of the estate.

[3.] One other assignment of error only, remains to be disposed of. His Honor, Judge HARDEMAN, held that the legatees took an absolute estate at once in the proceeds of the

property directed to be sold; whereas, it is insisted that the investment in bank stock, should at least be first made, and that the executory trust continues for and during the life of each legatee.

But what sufficient reason can be assigned, why the bequest should be limited to the life of the legatee? Our construction is, that it was a gift of the dividends to all the nephews and nieces, the children of Richard and Jesse Bledsoe, deceased, without limitation of *time*, and not in joint tenancy, but in common. And that upon the principle that a devise of the rents and profits of land, is a devise of the land itself; and that when the interest or produce of a legacy is given to or in trust for a legatee without limitation as to continuance, the principal will be considered as bequeathed also, and that absolutely an unconditional fee vested immediately in the legatees. (2 *Roper on Leg.* 331. 4 *Ves.* 51. 1 *Johns. Ch. R.* 494. 18 *Ves. R.* 463. 1 *Bro. Ch. C.* 532. 1 *Mad R.* 253. 2 *Ib.* 188. 8 *Co.* 95, *b. Cro. Jac.* 104. 1 *Ves. R.* 170, 528.)

In *Newland vs. Shepherd*, (2 *P. Wms.* 194,) the testator devised the residue of his real and personal estate to trustees in fee, in trust, to pay the *interest* thereof for the maintenance of his grand children until they should come of age or be married; and he went no further, nor made any other disposition of his estate; and yet, this was held to pass the absolute property to his grand children after the age of twenty-one. "This case," says Chancellor *Kent*, in *Earl vs. Gwin and Wife*, (1 *Johns. Ch. R.* 494,) "has been questioned, and perhaps very justly; for there was an express limitation of the period of the payment of interest to the minority of the children; *but in a case in which there is no such limitation, I apprehend the decision would be deemed correct.*"

In General Bledsoe's will, there is no limitation of the period of the payment of interest.

In *Philips vs. Chamberlaine*, (4 *Ves.* 51,) trustees were directed, by will, to pay the *dividends and interest* of certain stock and funds to the legatees, share and share alike, and

the survivor of them, as they attained the age of twenty-one. And the Master of the Rolls said he had never heard, that where the testator gave forever and without limitation, the dividends and interest to accrue upon the residue of his personal estate, that it would not carry the whole interest; and he apprehended that where the dividends and interest of the residue were given absolutely to the trustee on trust, to pay the interest and dividends to A from time to time, without any limitation of duration, it would carry the principal.

We deem it a work of supererogation to elaborate this point further.

4. Moreover, as this bequest is for the benefit of the legatees alone, it is competent for them to elect whether they will take the property itself, its proceeds, or the bank stock, in which the funds arising from the sales is directed to be invested. (1 *Roper on Leg.* 370–'1–'2–'3.)

We have been notified by our brother BENNING, that he shall dissent from so much of this opinion as recognizes the validity of the will, believing, as he does, that the whole testament is null and void, under the Acts of 1801 and 1818, prohibiting manumission.

This will has been proven and admitted to record by the proper tribunal, without contestation, and the executor comes into Court, *upon the will*, and asks direction as to its execution. Whether the will, therefore, as to the property or pecuniary legacies, be in issue, by the pleadings in this *forum*, may well be doubted. And although void as to the emancipation clause, so as to create an intestacy as to the slaves, it it may nevertheless be valid as to the other items. By the 17th section of the 1st article of the Constitution, it is provided, that no law or ordinance shall pass, containing any matter different from what is expressed in the title thereof. And yet, no Court in Georgia has ever held that the whole Act was a nullity; but only so much and such parts thereof, as were obnoxious to this constitutional inhibition.

But waiving thes eobjections, I am content, for the present, to pass this point in silence, maintaining, as I do, that it is

no longer an open question in this State; but that question was settled, and correctly settled, and had been by every department of the Government for more than a quarter of a century before the organization of this Court. And for the reasons of this opinion, I beg leave to refer to the case of *Cleland against Waters*, decided at Gainesville, October, 1854, and not yet published. If a change of policy is demanded by recent developements, it is for the Legislature, and not the Judiciary, to initiate it.

STARNES, J.—concurring.

Our brother BENNING agrees with Judge LUMPKIN and myself in the views which we take of the points presented in this case, if the will be valid; but he is of opinion that the will, as a whole, is invalid, because contravening the provisions and policy of the Acts of 1801 and 1818. On this point, therefore, the duty devolves upon me of assigning my reasons for the judgment with which I have concurred.

1. As no question has been made or decided in the Court below, upon the validity of the will as a whole, but the same has been duly and regularly admitted to record without issue upon this point, I am of opinion, that this subject is not now submitted for our consideration.

2. The second section of the Act of 1818, declares that the third section of the Act of 1801 shall be so construed as "to inhibit the recording only so much of any instrument (as is therein described) as shall relate to the manumitting or setting free of any slave or slaves." By inference, therefore, the Legislature intended to render invalid only thus much of any such instrument.

The fourth section of the Act of 1818, in terms quite as

the Act of 1801, declares, that "All and every will and testament, &c. or other instrument, in writing or by parol, made and executed for the purpose of effecting, or endeavoring to effect, the manumission of a slave or slaves, shall be, and the same are hereby declared, to be utterly null and void." But if, as is shown above, the same Act provides, that language of similar import in the Act of 1801 shall be construed to render valid only so much of the instrument as shall relate to the manumission, it is to be inferred that similar language is to receive the same construction in the Act of 1818. That latter Act, then, according to a construction which itself prescribes for itself, would render invalid only so much of this will as relates to the manumission of the slaves, if it affected it at all.

As we agree, however, that this portion of the will is void, because impossible to be executed, there is no occasion to consider whether or not it is void for any other cause.

3. As to the position, that a bequest of freedom to slaves, even though the emancipation is to take effect out of the limits of the State, is contrary to the policy of these Statutes, and therefore, void, I have a few observations to make.

It cannot properly be said that any transaction is contrary to the policy of a law, if the thing done is not prohibited or forbidden by that law. Whatever may have been said in the argument of the policy of these Acts of 1801 and 1818, it has not been successfully shown that they prohibit emancipation which is to take effect out of the State. In both Acts, such language is used as indicates a reference, by the Legislature, to emancipation within the limits of the State. The Act of 1801, for example, declares, that "the said slave or slaves so manumitted and set free, contrary to the true meaning and intent of this Act, shall be still, to all intents and purposes, *as much in a state of slavery as before they were manumitted and set free*," *&c.* The application of such a provision to emancipation, by sending slaves into the free States, or to Liberia, would have been simply absurd. In the latter event, the manumitted slaves could not be placed, of course, as much

in a state of slavery as before they were set free. [illegible] umission contemplated by the Act, therefore, must hav[illegible]n such, that to it this provision could be made applicable. If so, it was manumission *in the State*, and could be none other.

So, too, the fourth section of the Act of 1818, referring to slaves who may be the subjects of intended manumission in the wills, deeds, &c. which were in contemplation, declares, that "Each and every slave or slaves in whose behalf such will or testament, &c. shall have been made, sh[illegible]e liable to be arrested by warrant, under the hand and seal of any Magistrate of this State, and being thereof convicted, &c. shall be liable to be sold as a slave or slaves," &c. "Each and every slave in whose behalf such will or testament, &c. may be made," (that is to say, all such slaves as were in contemplation of the Act,) shall be arrested in the contingency specified, by any Magistrate *of this State*, *&c.* Of course, then, it follows, that the Act must have reference to such slaves as are emancipated within the jurisdiction of the State.

The preamble of this Act, too, declares what sort of manumission was contemplated by the Legislature, and what was the "sound policy" of the State, which the passage of the Act was intended to promote. It announces, that this p[illegible]icy is to be considered with reference to the relations of free persons of color *within the State* to the free citizens and to the slaves thereof, as the number of the former may be increased "by manumission or by the admission of such persons to reside therein," &c.

What these Statutes do provide and were intended to provide, is thus shown very plainly. And unless the policy of a law is to be sought and found outside of what the law was intended to enact, and positively does enact, it cannot correctly be said, that the policy of these Acts is opposed to the manumission of slaves, by sending them out of the State.

It seems to me, that this view of the matter is conclusive upon the subject of the policy of these Statutes, and decisively disposes of it. But I must add, that I concu[illegible]ith my

brother LUMPKIN in thinking that this question of policy should be considered, now, as hardly an open question in our State. As was said in the case of *Cleland vs. Waters*, it has been decided according to the views which we now take of it, by Circuit Judges, by the Convention of Judges, and by this Court. And these decisions have been long acquiesced in by the Legislature, without interference.

As to what may be considered the truly sound policy *of the State* in this matter, that is another question, and a question for the legislator. Policy may demand that laws should be passed, if this can properly be done, prohibiting the removal of any slaves from the State for the purpose of emancipating them. But this has not been done yet, and we are called on in this case to say what the law is, and not what it should be.

Upon the subject of this State policy, however, I am not prepared to admit, that looking upon this question as a feature in the political economy of the State, that a law thus prohibiting every extra territorial manumission would be expedient and wise.

I, myself, doubt the policy of permitting free persons of color to be sent into the Northern and Western States of this Union, to increase the number of paupers and aid in swelling the abolition chorus by their votes and voices. Yet, several interesting and most cogent reasons can be assigned, why it would not be for the best interests of the slave holding citizens of the State to prohibit the removal of slaves from the State to any place whatever. But this is a subject which, to be properly treated, would require more to be said and shown than would become the limits of this judgment; I therefore forbear further to discuss it.

BENNING J.—dissenting.

In these two cases, I dissent from the judgment of the Court. In my opinion, the whole will is void—doubly void—void both by the act of 1801 and the act of 1818. For this opinion, my reasons are as follows:

The will has in it these two items: "Item 3d. I will and desire that there shall be a sufficiency of good arable land, purchased either in the State of Indiana or Illinois, for all my negroes to locate upon and cultivate, with a sufficiency of land for timber and firewood included; to be done within a reasonable time after my death, by my executors or any one or two of them, and to remove all of my said negroes to said tract or settlement of land in the State of Indiana or Illinois, as aforesaid, but would recommend for the title to said land to be made to my executors, in trust, for the use of said negroes, for fear they might be defrauded out of the land, or squander it themselves."

"Item 4th. I will and desire, after the removal and location of said negroes west of the Ohio river, that they be purchased an outfit of farming utensils, including the wagons and teams used in their removal as a part of said outfit; and further request, that there be also purchased for said negroes the first year's provision for their subsistence after their removal."

A part of another item is in these words: "I will and desire, after the removal, location and outfit for my negroes shall have been completed in the State of Indiana or Illinois, as aforesaid, that the balance or residue of the proceeds of my property shall be vested in stock of the State Bank of Georgia," &c.

The meaning of all this plainly is, that he, the testator, wills his slaves to be free, either in Indiana or Illinois; not only to be free, but to be the owners of land and other property. This Act of manumission he does in Georgia, which too, are the negroes to be manumitted.

The Statute of 1801, to which I have referred, is entitled an "Act prescribing the mode of manumitting slaves in this State." The first section of it is as follows: "From and after the passing of this Act, it shall not be lawful for any person or persons to manumit or set free any negro, slave or slaves, any mulatto, mustizoe, or any other person or persons of color, who may be deemed slaves at the time of the passing of this Act, in any other manner or form than by an application to the Legislature for that purpose."

To manumit or set free, in *any other* manner or form than by an application to the Legislature, shall not be "*lawful.*" This is the section. Every manner or form of emancipation, except one, shall be unlawful. This is what the words plainly say. In these words is no ambiguity.

And in the interpretation of Statutes, it is the rule of rules, that the words, if unambiguous, are to be followed. We have, then, to follow these words; and when we do that, we have to say that the manner or form of manumission contained in the aforesaid parts of this will was not "lawful," for that manner or form is different from that only one which the words permit, viz: "by an application to the Legislature."

And if the manner and form of the manumission was not lawful, the Act of manumission was of course void; that is to say, as much of the will as consists of the extracts aforesaid, was void.

This is the result from the first section of the Act.

By the last section, not only these parts, but the whole of the will is made void; for that section prohibits, under penalty, the admission to record of "any deed of manumission or other paper, which shall have for object, the manumitting and setting free any slave or slaves." And no paper that cannot be admitted to record, can become a will—can, as a will, be otherwise than void.

It is true that this section is, by the second section of the Act of 1818, to "be construed to extend to inhibit the recording only of so much of any instrument (as is therein

described) as shall relate to the manumitting or setting free of any slave or slaves." But any implication from this, favorable to the notion that the rest of such an "instrument" is made valid, is rebutted by a part of the fourth section of the same Act of 1818, which declares that "all and every will and testament," &c., made and executed for the purpose of effecting, or endeavoring to effect, the manumission of any slave or slaves, either directly, by conferring or attempting to confer, freedom on such slaves, &c. &c., shall "be utterly null and void."

This being so, the nullifying power of the third section of the Act of 1801 is left in full force.

The result, therefore, from that third section, together with the first section, is to render this *whole* will void.

The result, then, from the Act of 1801, taken by itself, is to render this will void. And this is no doubtful result. It is the necessary result, from the words—from words entirely free from ambiguity; from words, the meaning of which is too plain to be mistaken.

No subsequent law that could affect this result, was ever passed by the Legislature, at least never before 1818. If, therefore, this will had been made at any time after the Act of 1801, and before 1818, it would have been rendered null by the Act of 1801. There has, then, been a period of seventeen years since 1801, at any time during which this will would have been void.

Has not the period been longer than seventeen years? Has it not continued up to this day? It has, unless the Act of 1801 has been repealed, or in some way changed. The next question, therefore, is, has that Act been repealed or so changed as to affect its power of annulling wills like the one under consideration? If so, it must have been done by the Act of 1818, for there has not been passed any Act touching the Act of 1801, other than the Act of 1818.

What, then, is the effect of the Act of 1818, on the Act of 1801?

The Act of 1818, is entitled "An Act supplementary to,

and more effectually to enforce an Act, entitled an Act prescribing the mode of manumitting slaves in this State;" that is to say, this very Act of 1801. This is the title of the Act of 1818—a title not to repeal that Act—not to change it in any way, but to add to it, and more effectually to enforce it. And this being the *title*, the Legislature, if they had had the wish to make the body different, could not constitutionally have made it so. (*Con. Art.* 1, *Sec.* 17.)

But the body of the Act corresponds with the title. The first section is, "that the Act, hereinbefore referred to" (the Act of 1801) "shall be strictly enforced; but the penalties therein prescribed, except where the same shall be otherwise provided for by this Act, shall be increased to five hundred dollars," &c.

The second section prescribes a construction for the third section of the Act of 1801; a construction by which that section is to be held to prohibit the recording of so much only of instruments of manumission, as may relate to manumission.

And this is all the mention which the Act of 1818, in title or body, makes of the Act of 1801.

The Act, then, of 1818, so far from repealing or changing the Act of 1801, enforces that Act. The result, therefore is, that notwithstanding the Act of 1818, the Act of 1801 still retains all, at least of its original force, to nullify wills of the kind in question; and therefore, the result is, that the will in question was nullified by the Act of 1801.

And here, on this Act of 1801, I might rest. It seems to me, that this Act, being taken to be in full force, there cannot be room for a doubt that it renders this will utterly void. If that be so, to go further could only be to slay the slain—to show the will doubly null if that were possible. Still I choose to go further.

I maintain then, that by the Act of 1818 itself, this will is rendered void. I maintain that this is so, both by the letter and the spirit of that Act.

And first it is so by the letter. Section four of the Act, is

in these words—"All and every will and testament deed, whether by way of trust or otherwise, contract, agreement, or stipulation, or other instrument in writing or by parol, made and executed for the purpose of effecting or endeavoring to effect, the manumission of any slave or slaves, either directly, by conferring or attempting to confer freedom on such slave or slaves, indirectly or virtually, by allowing and securing, or attempting to allow and secure to such slave or slaves, the right or privilege of working for his, her or themselves, free from the control of the master or owner of such slave or slaves, or of enjoying the profits of his, her or their labor or skill, shall be, and the same are hereby declared to be utterly null and void; and the person or persons so making or executing any such deed, contract, agreement, stipulation, or other instrument, in writing or by parol, and all and every person or persons concerned in giving or attempting to give effect thereto, whether by accepting the trust thereby created, or attempted to be created, or in any other way or manner whatsoever, shall be severally liable to a penalty not exceeding one thousand dollars, to be recovered in the manner hereinafter pointed out; and each and every slave or slaves, in whose behalf such will or testament, deed, contract, agreement or stipulation, or other instrument, in writing or by parol, shall have been made, shall be liable to be arrested by warrant, under the hand and seal of any Magistrate of this State, and being thereof convicted, in the manner hereinafter prescribed, shall be liable to be sold as a slave by public outcry, as slaves, and the proceeds of such sales shall be appropriated in the manner specified in the first section of this Act."

"Every will," &c. "executed for the purpose of effecting or endeavoring to effect the manumission of any slave or slaves, either directly, by conferring or attempting to confer freedom on such slave or slaves indirectly or virtually," &c. shall "be utterly null and void," &c. These are the words of this fourth section, and they are too plain to be misunderstood. They make utterly null and void this will, if it was executed for the purpose of effecting, directly or indirectly, the manumission

of slaves—directly, by conferring freedom on the slaves themselves, or indirectly, by allowing the slaves the privilege of working for themselves; for the words make "*all and every*," such wills or will utterly null and void. All and every are *universal* terms. They include wills made for effecting emancipation outside of the State, as well as those for effecting emancipation inside of the State. And this will is such a will, for it was executed for the purpose of conferring freedom "directly" on slaves themselves, either inside or outside of the State. Therefore, these words make this will void. That is to say, the will is void by the *letter* of the Act.

But if it is void by the letter, it is also void by the spirit; for when the letter—the words of a Statute, are plain and unambiguous, it is *they* that are to be considered as *also* speaking the spirit—the *true intent and meaning* of the Act. This, nobody disputes, is the rule of rules in the interpretation of Statutes. And these words are unmistakeably plain and unambiguous.

Thus, then, I insist that I have made out my proposition, which was, that this will is void, both by the letter and the spirit of the Act of 1818.

But I know that against this proposition, was used an argument drawn from the preamble of the Act, taken in connection with the tenth section.

The preamble of the Act is as follows: "*Whereas*, the principles of sound policy, considered in reference to the free citizens of this State, and the exercise of humanity towards the slave population within the same, imperiously require that the number of free persons within this State, should not be increased by manumission or by the admission of such persons from other States, to reside therein: *and whereas*, divers persons of color, who are slaves by the laws of this State, having never been manumitted in conformity to the same, are nevertheless in the exercise and enjoyment of all the rights and privileges of free persons of color, without being subject to the duties and obligations incident to such persons, thereby constituting a class of people equally dangerous to the

free citizens of this State, and destructive of the comfort and happiness of the slave population thereof, which it is the duty of this Legislature, by all just and lawful means, to suppress."

The tenth section is as follows: "It shall be the duty of all Courts and Judges before whom any proceedings may be had under this Act, so to construe the several provisions thereof as to carry the same into full and complete effect, according to the true spirit, intent and meaning thereof, as declared in the preamble of the same," &c.

The argument was this: that by the preamble of the Act, "the true spirit, intent and meaning" of the Act, is declared to be to prevent the increase of free persons of color *within the State*; that by the tenth section, the Act is to be carried into effect "according to the true spirit, intent and meaning thereof, as declared in the preamble;" and therefore, that even if the body of the Act goes so far as to prohibit wills, &c. manumitting slaves outside of the State, it is to be restrained by the preamble and the tenth section, to wills manumitting slaves inside of the State.

To this argument, waiving for the present the question whether, when the preamble of an Act and the body differ, the body is not to govern the preamble, rather than the preamble the body, I have two answers to make—first, I deny the conclusion—secondly, admitting the conclusion, I deny that it saves this will from the nullifying power of the body of the Act. I say, that this is a will, which, if effect is to be given to it, manumits the slave *within* the State, as well as without the State.

First, I deny the conclusion. These are the premises viz: the body of the Act is to be construed according to the intent, as declared in the preamble; the intent, as declared in the preamble, is to prevent the increase of free persons of color within the State. Now, what is the true conclusion from these premises? Obviously this: The body of the Act is to be so construed, as to make it *most effectual* for preventing

the increase of free persons of color within the State. But is it true, that the construction, which makes *valid* wills, &c. giving slaves their freedom *without* the State, is the construction which is most effectual to prevent the increase of free persons of color within the State? The slaves, when they have become free without the State, can if they please, return as free persons into the State. True, in doing this, they may violate a law of the State. But how many laws of the State are violated—how easy without risking much, to violate this law. In fact, has the law, practically, ever been anything more than a dead letter? And then as to the validity of such a law, what grave question, under the Constitution of the U. S. has been made by half of the States of this Union, and by foreign nations under treaties of commerce and amity with the United States. It seems to me that there is a construction far more effectual for preventing the increase of free persons of color within the State than this, and that is the construction which shall render *invalid*, even wills giving slaves their freedom *outside* of the State. If such wills shall be held to be invalid, the effect will be, that the slaves they would free *will remain slaves;* and if the slaves remain slaves, it will be simply impossible that they can make any increase in the number of free persons of color within the State. Now I ask, is there any possible construction to be put upon the body of the Act, which would render it more effectual to prevent the increase of free persons of color within the State than this would? At least, may I not ask, whether this construction would not be far more effectual to accomplish that purpose than would the other? If so, then, the *true* conclusion from the premises is, that this construction is the one which the preamble and tenth section require to be put upon the body of the Act, in preference to the other construction—the construction, viz: which would render valid such wills, &c. as might manumit slaves outside, but not inside the the State.

And this is the construction which the words, themselves, of the body of the Act, as we have seen, call for. These

words are "all and *every* will" made for the purpose of emancipation, &c. shall be invalid—"utterly null and void." It seems, then, that the intent of the Act, as declared in the preamble, will be *most effectually* accomplished *by letting the words of the body of the Act have their full meaning.* Therefore, can there be a doubt that the true conclusion from the premises aforesaid, viz: the preamble and tenth section themselves, is that this will, even if it gives freedom, to be enjoyed only out of the State, is invalid?

Secondly, admitting the conclusion in the argument, I am answering to be the true one, I deny that that conclusion saves this will. The conclusion is, that the Act, read by the light of the preamble and the tenth section, tolerates wills which give freedom to slaves, if they give it to be enjoyed outside and not inside of the State. Now, I say, that conceding this to be the correct conclusion, I deny this will to be such a will. I say that if this will is sufficient to impart freedom without the State, it is sufficient to impart it within the State. I say that if it be true, that the slaves are to be free without the State, it follows that they can no longer be slaves within the State. My position is, that if we hold this to be a good will for the purpose of the exterior emancipation it provides for, we have to hold that it will have *the effect* to emancipate the slaves while they remain in Georgia, waiting for their place to be prepared for them, out of Georgia.

If, then, the will is held to be valid as to the exterior emancipation, the question is, what is to be the condition of the negroes, in the interval between the testator's death and the time of their contemplated exodus from the State? It cannot be a condition of slavery, for there is wanting to it any slave owner. There is nobody who is to have any title to the slaves during that time. If so, who is it? the executor? If the executor, then he must hold them as assests, and so merely in trust for the legatees, or heirs, or creditors. But the whole spirit of the will forbids the idea that the executor was so to hold them. Is it to be said, that the le-

gal title will be in the executor, in trust for the negroes themselves? Be it so. That will make the negroes free, for that will put the equitable title to the negroes *in* the negroes themselves, and the equitable title to a thing is, in effect, the whole title to it. On every view that I can think of, the result is the same, viz: that in the interval elapsing after the testator's death, and before the departure of the negroes from the State, they are to be free persons.

And if they are, during that interval, to be free within the State, how are they ever to be got out of the State, unless they, of their own accord, choose to go out? Suppose they absolutely refuse to go out, is there any mode of compelling them to go out? I know of none. Is there any person who has the right to require them to go out? I know of none. Is there any person who has the power to force them to go out? I know of none. What would be the form of proceeding against them, to get them out of the State—what would be the form of the judgment—of the execution? Would they be sent under a guard of soldiers, to the borders of the State, or passed from Sheriff to Sheriff, of the different counties through which their route would lie?

The simple truth is, that they could never be got out of the State, unless they chose to go out. If, therefore, they should not choose to go, they would stay, and thus they would permanently increase the number of free persons within the State.

The result is, that this will, if good to make the slaves free out of the State, of necessity makes them, during the interval that is to precede the time of their going abroad, free in the State; and by making them, during that interval, free in the State, it gives them the option of being, during all time, free in the State. And what more than this could a will do, expressly conferring on them emancipation in the State? And therefore, if such a will as that is according to the argument I am answering, forbidden by the intent of the Act, as declared in the preamble, then this must also be.

I say, therefore, that conceding to the argument I am an-

swering, that it was not the purpose of the preamble of this Act of 1818 to prohibit any wills, &c. except those which would manumit slaves *within* the State, it is not thence to be concluded that it was not the purpose of the preamble not to prohibit this will; for this will, if held to be good to manumit the slaves without the State, has, of necessity, to be held in effect to manumit them within the State.

The argument then, I insist, is answered. But in giving the answer, I waived, for the time, the question whether, when the preamble of a Statute and the body differ, the preamble ought not rather to yield to the body, than the body to the preamble. That question I waive no longer. I now insist upon the maxim, that the body of a Statute controls the preamble, and not the preamble the body.

Let us, then, apply the maxim—the body of the Act declares that "all and every will," &c. executed for the purpose of effecting, or endeavoring to effect, the manumission of any slave or slaves, shall be "utterly null and void." If the preamble differs from this, the preamble is, according to the maxim aforesaid, controlled by this.

Especially must this be true of the body of the Act of 1818, because the body of that Act agrees with the *title* of the Act, which is to enforce &c. the Act of 1801—an Act which, itself, annuls all sorts of manumission "in any other manner than by an application to the Legislature," and if the preamble differs from the body, it differs from the title, *and is*, therefore, in violation of the Constitution of the State.

I claim, also, the benefit of another leading rule of interpretation, and that is, the different parts of a Statute shall be construed together, and so construed, if possible, that every part shall stand and have its full effect.

Now I have already shown, that admitting the object of the preamble to be only to prevent the increase of free persons of color within the State, then, still the most effectual way of accomplishing the object would be to hold invalid *every* "will," &c. that would change slaves into free persons,

whether the will would make the change in the State or out of the State.

The body of the Act says, that every such "will," *shall* be invalid.

If, then, we so interpret as to say that every such will shall be invalid, we prevent any conflict between preamble and body, and give *full* effect to both. Whereas, if we so interpret as to say that though the object, as declared in the preamble, was to prevent the increase of free persons of color within the State, yet, it was to prevent such increase only, by prohibiting "wills," &c. manumitting slaves within the State, we bring about a conflict between body and preamble; for the body prohibits "all and every will," &c. of manumission. And the effect of such a conflict must always be, that some part of the Act shall give way. The body shall enlarge the preamble, or the preamble shall contract the body. We are bound, therefore, according to the last mentioned rule of interpretation, to interpret this Statute in the former and not in the latter of these two modes.

And again, the *title* of the Act comes in aid of this rule of interpretation, in the same way and to the same extent as it did in aid of the other rule.

And this concludes what I had to say on the Statutes of 1801 and 1818.

I will now sum up the propositions which I think I have established—

1. That this will is void, by the plain words of the Act of 1801.

2. That the Act of 1801 is still in full force—made to be in fullre force, if that were possible, by the Act of 1818.

3. That the will is also void by the plain words of the Act of 1818; and that as the words are *plain*, *they* must be held to speak the *meaning* of the Act.

4. That, however, if we are at liberty to take the preamble of the Act of 1818 as controlling the body, and not the body the preamble, then, still the true intent of the Act is not merely to prohibit "wills," &c. manumitting slaves inside of the

State, but "all and every will," &c. of manumission, because such universal prohibition is the *most effectual* way to prevent the increase of free persons of color within the State, the prevention of which increase is, if we take the words of the preamble, the object of the Act.

5. That even if the true intent of the Act be allowed to be to prevent "wills," &c. manumitting slaves within the State, but not wills manumitting them without the State, yet, that this will is prohibited by this intent: for this will cannot be valid for the purpose of manumitting slaves without the State, unless it be held to have the effect to manumit them within the State during the interval that must precede their exit from the State.

6. That if the slaves become, during that interval, free in the State, it is at their mere option to say whether they will not stay during all time, free in the State.

7. That if the preamble would narrow the prohibition to "wills," &c. manumitting slaves within the State, it could not do it; for if it did, it would over-ride the body of the Act, and the body of an Act rather over-rides the preamble, especially if the body agrees with the *title*, and the preamble does not.

8. That to interpret the preamble, as meaning to prohibit every "will," &c. manumitting slaves, is so to interpret it as to make it precisely agree with the body of the Act: whereas, to interpret the preamble as meaning to prohibit only "wills," &c. manumitting slaves within the State, is so to interpret it as to bring on a conflict between preamble and body, in which either preamble or body must be the sufferer.

If these propositions are true, this will is void—over and over again void. That is plain. Are they true? I think they have all been proved to be true. What is there to be urged against their truth? nothing of which I am aware, except some decisions, viz: (*Jordan vs. Heirs, &c. of Bradley, Dud. R.* 170. *Roser vs. Marlow et al. R. M. Charlton's R.* 547. *Vance vs. Crawford*, 4 *Ga. R.* 458. *Cooper, adm'r vs. Blakey*, 10 *Ga. R.*)

In the first of these cases, which was decided in 1830, the report says: "The will, among other things, directs that if any of his slaves should desire to go to the African Colony, they should be permitted to go, and their expenses to the port of embarkation should be paid."

This will the Court, in three brief paragraphs, declares to be valid; and it puts its decision upon the ground, that "the Act of 1818, (*Prince's Dig.* 465,) and those which preceded, were intended to prevent the emancipation of people of color in this State, where their presence could not fail to be injurious to the slave population." And in aid of this ground, the Court adds, "the policy of our legislation, since 1798, has certainly been unfavorable to the increase of slaves within the State. The Constitution of that date, roundly prohibits the importation of slaves into this State from Africa or other foreign places, after the first day of October of that year."

In the next of the cases, the decision is, in the same brief manner, put upon the same ground.

In the third of the cases, the Court say, "owners can, in their lifetime, carry or send their slaves to the coast of Africa, to be colonized, or elsewhere, for the purpose of freeing them." "We hold it equally certain, that they can direct the same thing to be done by their executors after their death. *Foreign* emancipation neither conflicts with the letter or spirit of our municipal regulations relative to this subject. On the contrary, it is in accordance with our declared policy." "Domestic emancipation" however, is, the Court says, against "the settled and uniform policy of our Legislature." And the Court says that both of these dispositions are sustained by the Act of 1817, which "empowers the Governor to cause to be sold, all negroes, mulattoes or persons of color, who may be brought into this State in violation of the Act of the United States, to prohibit the importation of slaves into this country after the first day of January, 1808." The third section of the Act providing, that "if, previous to any sale of any such persons of color, the society for the colonization of free persons of color within the United States, will undertake to

transport them to Africk or any other foreign place which they may procure as a colony for free persons of color, at the sole expense of said Society; and shall likewise pay to His Excellency, the Governor, all expenses incurred by the State since they have been captured and condemned—His Excellency, the Governor, is authorized *and requested to aid in promoting the benevolent views of such Society, in such manner as he may deem expedient.*"

The decision in *Cooper vs. Blakey*, the last of the four cases, is put upon the ground, that the question had already been decided in the case of *Vance vs. Crawford*.

Are these decisions sufficient to overthrow the argument which I have advanced? I think not.

I admit that decisions are excellent evidence of the meaning of a Statute, *if the language of the Statute give a doubtful meaning*. But if the language of the Statute give a clear meaning, I deny that it is in the power of one or two, or any number of decisions, to make the Statute give a different meaning. If the language of a Statute is clear, I deny that a Court is even *at liberty* to look beyond the language for a meaning—to look, for example, to what *it* may deem the spirit and reason, or as it is more vaguely called, the policy of the Statute.

If, in such a case, a Court is at liberty to look beyond the language for a meaning—if a Court is at liberty to hold that the Legislature did not mean what it says, then it follows, I insist, that what is law, does not depend on what the Legislature says, but on what the Judiciary says; and this, it seems to me, is to make the Judiciary potentially the Legislature. If, therefore, in such a case, a Court should go beyond the language of the Statute for a meaning, and place its decision upon the meaning thence obtained, the decision, in my opinion, would be one to be utterly disregarded in any future interpretation of the Statute.

Now, this, I think, is just what these decisions do. And the argument which I have advanced, it seems to me, shows

it. Let us apply some small part of that argument to these decisions.

The Act of 1801 says: "it shall not be lawful for any person or persons, to manumit," &c. "in any other manner or form than by an application to the Legislature for that purpose."

These decisions say it shall be lawful for a person to manumit in another manner than by an application to the Legislature, viz: in any manner at all, which shall have the effect to carry the manumitted slaves out of the State to any place at which they may enjoy freedom.

These decisions, then, it is evident, have to go beyond the language of this Act, to find a meaning on which they can place themselves. And what is remarkable of *this Statute*, is, that beyond this language of it, there is nothing to which they can go for such a meaning. *This* Statute is without a preamble. The Act of 1818, with its preamble, is a subsequent Statute, as is, also, the Act of 1817, referred to in *Vance vs. Crawford*.

The Act of 1818, by *title* and body both, is only to enforce and add to this Act of 1801.

These decisions, then, being, as it appears to me, contrary to the plain language of the Act of 1801, are not at all to be regarded in the interpretation of *that* Act.

Then, as to the Act of 1818, the language of the fourth section is: "all and every will and testament, deed," &c. "made and executed for the purpose of effecting, or endeavoring to effect, the manumission of any slave or slaves," &c. "shall be, and the same are hereby declared to be utterly null and void," &c. This language makes no exception. "All and every;" there can be *no* "will," &c. for emancipation which these terms do not include.

Yet, these decisions say that any will made for the purpose of effecting the manumission of slaves, is not utterly null and void, but is good and valid, if the manumission to be effected, be a manumission not to be enjoyed in the State, but in some other place, it makes no difference what other. And

for a meaning to rest on, they all go, or seem to go, beyond these words to the preamble; and one of them, *Vance vs. Crawford*, goes, also, to the Act of 1817.

Admitting that the decisions may, in the case of this Statute, go to the preamble to hunt for a meaning by which to support themselves, I say they find none there. I say, that in the preamble is to be found nothing inconsistent with the universality of the prohibition contained in the words aforesaid, quoted from the body—nothing which is not entirely consistent with that universality—for, conceding that the preamble means no more than to prevent the increase of free persons of color within the State, yet, is it possible to conceive of any more effectual way to do that, than to prevent slaves from becoming free persons at all—and that is the way to do it which, by these words, in the body of the Act, is prescribed.

These decisions, then, are, as it appears to me, contrary, also, to the clear language of the Act of 1818; and that being so, I deny that they can receive any support from the Act of 1817, even if that Act were such that it could not be read as perfectly consistent with the language of the Act of 1818; for the Act of 1818 is, of the two, the later Act.

And the decisions so being, as it appears to me, contrary to the clear language of the Act of 1818, they are, as I think, to be also disregarded in the interpretation of *that* Act.

And this, to one who entertains the opinions, as to the interpretation and observance of Statutes, which I entertain, would be enough to show these decisions insufficient to prevent this will from falling before these Statutes.

But these decisions seem, all, to have been put mainly, if not altogether, upon the notion that there is a sort of understood "policy" of the State which sanctions such decisions; and, therefore, it will be no more than respectful to the decisions that I briefly notice this notion; though, in doing so, I may have to pass into a region which I deem entirely exterior to the case—*the region of policy*.

What, then, are the decisions? The first of them is, that a will which permits slaves to go to the "African Colony,"

is valid; the second is, that a will which directs slaves, in case they could not be freed by the Legislature, to be sent "where it can be done, out of the State," is valid; the third is, that a will which gives slaves to the Colonization Society "for the purpose of being sent to Liberia," is valid; and the third is, that a will which directs the executor to "take a slave to his residence in Kentucky, and as soon as she can be manumitted by the laws of said State, to have it done; but should the laws of Kentucky be adverse to manumission," then to take the slave to some other State, where she might "become free."*

These are the decisions, and they seem to be characterized by a kind of growth: the first, sanctioning an act of manumission, by which the freedom given is to be enjoyed in the "African Colony"; the last, an act of manumission, by which the freedom given is, if possible, to be enjoyed in Kentucky, a slave State of this Union. If, in this last case, the will had said South Carolina or Alabama, instead of Kentucky, it is plain that it would have been sustained by the principle of this decision. This last decision then, in principle, amounts to saying, that if all the men in Augusta should, by wills, manumit their slaves and direct them to be carried across the river, four hundred yards, into Hamburg, the wills would be valid unless there should be something in the laws of *South Carolina* to make the wills invalid.

Now I must say, that decisions of this import are not sanctioned by any policy of the State with which I am acquainted.

What is policy—the policy of a State? and where is to be found the evidence of such policy? I suppose that the policy of a State, on any subject, is the general inclination of the State on that subject, and that the evidence of what that inclination is, we are to seek for in the laws and Acts of the State, taken as a whole, on that subject.

What policy, then, do the laws and Acts of this State show to be the State's in reference to emancipation? The earliest Act on the subject, that of 1801, makes, as we have seen,

every form of manumission, except that founded on an application to the Legislature, unlawful.

The Act of 1818 does the same thing. It is true, that this Act, in its preamble, recites that sound policy, considered in reference to the free citizens of this State, and the exercise of humanity towards the slave population within the same, requires that the number of free persons within the State should not be increased by manumission, or by the admission of such persons from other States to reside therein. But if a manumission that retained the manumitted within the State, would be bad for the free citizens, and bad for the slave population, a manumission that sent the manumitted into a neighboring State, or even into a distant country, would be also bad for both, but bad in a less degree. If the former sort of manumission would be calculated to produce among the slave population discontent, to be followed, on their part, by insubordination, massacre of free citizens, insurrection, and on the part of the free citizens, by a war of repression, with its sequel of punishments, and measures of precaution against the happening of such occurrences again, the latter sort of manumission would be calculated to produce the same things, but only, perhaps, a little less calculated to do so. The great generic fact, *freedom*, would be common to both sorts, and it is this, that rising like a lone mountain, to be seen by all eyes far and near, would be the chief disturber of the unmanumitted slaves. That this manumission was of the kind to be enjoyed in some other State of this Union, or even in some foreign country, rather than in this State, might perhaps make the manumission the more potent as a disturber, upon the principle, that "it is distance that lends enchantment to the view." In manumission, in which the manumated remained in the State, the facilities for communication and combination between the manumitted and the unmanumitted, would, it is true, be greater than they would in the manumission, in which the manumitted were sent abroad. And this is the main, if not the only difference, between the

two kinds. But in the latter kind, these facilities would, at this day, be very great.

The reason, then, why the preamble of the Act declares it to be against sound policy, that slaves should be manumitted, to enjoy their freedom within the State, exists, in a great degree, to make it against sound policy, that slaves should be manumitted to enjoy their freedom out of the State.

And to the aid of this condemnation of this latter kind of manumission, afforded by the reason of the preamble, comes the body of the Act, with its sweeping clause, and says that "all and every will," &c. for the purposes of manumission, shall be void.

And this being so, there is nothing, as I think, in this preamble of the Act of 1818, to show it the policy of Georgia to tolerate emancipation, which is to be enjoyed abroad.

These two Acts then—the Act of 1801 and that of 1818, condemn every species of emancipation except one: that founded on an application to the Legislature. And they are the great, leading Acts on the subject. They, therefore, are the Acts to which, if to any, we are to go, to find out what is the *policy* of the State, as to emancipation.

These Acts, then, testify that every sort of emancipation is forbidden by the *policy* of the State.

There is another Act of the State, which bears high witness against the sort of emancipation that is to be enjoyed in the free States. The action of the State Convention of 1850, shows the State to feel a deep solicitude in the recovery of fugitive slaves, and especially, in the execution of the "fugitive slave law." But every manumitted slave that may be sent from the State to a free State, will make more difficult the recovery of such slaves, and the execution of that law. It is notorious, that the free negroes of the free States take a most active and efficient part in the scenes of violence and frequently of bloodshed, which attend attempts to recover fugitive slaves. Is it the policy of the State to make the recovery of fugitive slaves, in the future, more difficult than it is at present?

There are acts from which it is to be inferred, that emancipation, whether to be enjoyed at home or abroad, is not according to the policy of Georgia. There is no Act which I know of, that authorizes the inference, that emancipation, to be enjoyed abroad, is according to the policy of the State.

The Act of 1817, which is cited in *Vance vs. Crawford*, as authorizing this inference, does not, in my opinion, at all authorize it. The Act authorizes and requests the Governor to aid the Colonization Society in sending the Africans back to "*Africa* or any other *foreign* place which" the Society might "procure as a colony for free persons of color;" it does not authorize or request him to aid in sending them to Indiana or Illinois, or to any other State of this Union. And these Africans—what, under the Act of Congress, was their true condition, was a vexed question. One thing is certain, their condition was such as to make it a perplexing matter to the State what to do in reference to them. (*Daw. Com. Res.* 5, 41, 56, 65. *Acts*, 310.) The *leading* idea, too, in the Act is, that the Africans were to be sold by the Governer into *slavery*. I submit that no evidence of one policy or another, in regard to the question of emancipating *native* slaves, is to be drawn from this Act.

There remain the several Acts of the State on the subject of the traffic in slaves between this State and the other slave States. This traffic has sometimes been forbidden, sometimes permitted. But although the traffic has at times been forbidden, and is now forbidden, the introduction of slaves from the slave States into this, by citizens of this State, or by immigrants into this State, for use and not for sale, has, I believe, never been prohibited.

But surely it is putting a degree of violence on these Acts, to make them bear witness in favor of the existence of a policy on the part of the State, to sanction any sort of emancipation. The most that can be said of any of these Acts, even the prohibitory ones, is, that they are not evidence of a policy that would *increase* the number of slaves within the State. It certainly cannot be said of any of them, that it is evidence of

a policy that would diminish the number of slaves already within the State. But these Acts, as I conceive, were the result of mingled motives, but of which none was a motive of abolition. The main reason for their enactment was, I think, a fear that this traffic, if permitted, would in the end, empty the more northern of the slave States of their slaves, and thus convert those States from friends and allies, into enemies and assailants. The chief reason was, I think, not at all to promote abolition in this State, but to prevent abolition in other States. Another reason was, no doubt, a disposition to keep the proportion of the free population to the slave from being materially changed. And avarice, probably, had some degree of influence—the avarice of the slaveholders already in the State, the value of whose slaves would be diminished, as the supply from abroad should be increased.

And, doubtless, it was reasons of this kind, and perhaps others, which caused the State to insert in its Constitution a section prohibiting the importation of slaves from Africa and other foreign places, but permitting the importation from the other slave States.

I deny, however, that from this section of the Constitution, or from any Act of the State or of the State Legislature, any inference, whatever, is to be drawn in support of the proposition, that the State has ever favored or sanctioned a policy of emancipation or abolition of any sort. I maintain that no Act of the State furnishes evidence of a wish that the number of slaves in the State should, in any mode, be *diminished;* and that the very most that can be drawn from any Act or Acts of the State, is, that the State did not wish the number of slaves *increased.*

I have thus gone to all the sources known to me, from which evidence of what is the "policy" of the State on the subject of emancipation could be obtained. And the result, I think, is, first, as I have just stated it, viz: that there exists no evidence going to show a policy on the part of the State in favor of any mode of *diminishing* the number of slaves within the State. Secondly, that there does exist evi-

dence of the most decisive kind—evidence consisting in the plainest declarations of the Legislature—going to show a policy on the part of the State, hostile to every species of emancipation whatever.

Concluding this part of the subject, I may say that, in my opinion, what is the policy or most general view of the State, on the subject of emancipation, is to be gathered from the earliest Act on the subject: the Act of 1801, in which she says that it shall "not be lawful" to manumit, "in any other manner or form than *by an application to the Legislature* for that purpose." In this declaration, standing in force to this day, I think I see a disposition on the part of the State, to make *every instance of emancipation, however small, a question of State.* This, I think, is, and has ever been, the "*policy*" of the State.

The result, then, is, that I find nothing in these decisions to shake my confidence in the conclusions to which I had come in my argument, made before taking up the decisions for consideration. That argument was, as I thought, and as I think, supported by the plain language and the evident meaning of two Statutes; and if it was, it ought to prevail, I feel confident, over any number of judicial decisions. It seems to me that if, in the face of the Act of 1801, which says that the slave owner shall manumit in no other way than on—eby an application to the Legislature; we can hold that such owner may yet do it in any other way, provided only he sends the slaves manumitted out of the State; so anxious are we to get rid of slavery, we can, in the face of the Constitution; which says that the Legislature shall have no power to pass laws for the emancipation of slaves in any other way than one, viz.: by consent of the owner, equally as well hold that the Legislature has, notwithstanding, power to pass laws for general emancipation in any way it pleases, with or without the consent of owners, provided only it sends away the slaves manumitted. If it is the policy of the State to be rid of slavery, provided it can also be rid of the slaves; and if this

policy is so potent as to permit the citizen to disregard the words of a Statute, is it not potent enough to permit the Legislature to disregard the words of the constitution?

I dissent from the judgment of the Court in these two cases. I think the will was void.

No. 16.—JOHN MCKENNY and others, plaintiffs in error, *vs.* PLEASANT M. COMPTON, Surveyor General, &c. defendant in error.

[1.] The Act of 21st of December, 1842, limiting the time in which grants should be taken out for lands drawn by orphans, &c. in the land and gold lottery of 1832, is not unconstitutional.

[2.] The time from which the limitation of twenty-one years shall commence to run, is the date of the drawing and not the close of the lottery.

Mandamus, in Baldwin Superior Court. Decided by Judge HARDEMAN, February Term, 1855.

The petition for *mandamus* in this case, alleged that the petitioners were the orphans of William Bowen; and as such, had drawn in the lottery of 1832–'3, Lot No. 141, 17th Dist. 1st Sect. of originally Cherokee, now Union County; that said lottery closed in July, 1833, before which time the petitioners had removed to the State of Mississippi, where they have since resided; that on 1st April, 1854, they complied with all the prerequisites of the Act and applied to the Surveyor General for a plat and grant, which he refused to issue. A *mandamus nisi* to the Surveyor General was granted. In return thereto, he admitted the facts as alleged in the petition, and added, that to the best of his information, the petitioners drew said lot on 23d November, 1832, more than 21 years before their application for a grant in April, 1854;

and that under the Act of 1843, they had thereby forfeited their rights.

On hearing the return, the Court below refused a *mandamus* absolute, and this is the error assigned.

H. Cobb; Rockwell; Kenan, for plaintiffs in error.

McKinley, for defendant in error.

By the Court.—Starnes, J. delivering the opinion.

[1.] It is first argued for the plaintiff in error, that the Act of 1843, limiting the time during which orphans, &c. may take out grants for lands drawn in the land and gold lottery of 1832, to twenty-one years from the drawing, was unconstitutional, because it impaired the obligations of the contract, into which the State entered with the fortunate drawer, when it passed the Act of 1830 authorizing this lottery; in which Act there was no such limitation.

The error of this position lies in the assumption, that the Act of 1830 was in the nature of a contract with the drawer. It authorized the lottery upon the terms prescribed, and admitted the citizens of the State, upon these terms, to take chances in the same. When any such chance resulted in a prize, the drawing (as this Court has said in the case of *Winter vs. Jones*, 10. *Geo.* 190,) did not vest the title. It simply clothed the drawer with the pre-emption right, as it were, of taking the land at the price of the grant. Such provision, too, was gratuitous on the part of the State. And it would be extremely unreasonable, under these circumstances, to hold that the State was bound, by contract, to recognize this pre-emption right forever, although the drawer manifested no intention ever to apply for the grant or to take possession of the land. It was but just, therefore, that the Legislature should fix the term of twenty-one years from the date of the drawing, as the period in which the drawer, if an orphan, would have ample time to secure a grant; and at the end of which,

if application was not made for such grant, it might be safely assumed that all intention of applying for the same was abandoned.

This opinion is not in conflict with the case of *Winter vs. Jones*. There the lot had been purchased at a sale of fractional lots, authorized by Act of the Legislature, for a consideration, to-wit: the sum of $1550 had been paid, in full, to the State, for the same; and the Court held that the Legislature could not afterwards forfeit the grant because it was not applied for in the time prescribed by the Act of 1847. This Court, in that case, in effect, recognize the distinction between the circumstances of that case and such a case as that now before us.

[2.] The next question for our consideration is, whether the limitation in this case shall run from the day on which the lot was drawn; that is to say, from *the drawing of the lot*, or from *the close of the lottery?*

The language of the Act of 1843 is, that the operation of the Act shall not apply to orphans "until twenty-one years shall have expired after *the drawing of such orphan or orphans*," *&c.* Not *the drawing of the lottery*. The limitation of the Act of 1830, upon the issuing of a grant to a fortunate drawer, other than an orphan, &c. was, that he should "take out his grant within five years from the date of said *draw*." In the Act of 1854, referring to this subject, the words are also, "all lands drawn by orphan or orphans, and not granted within twenty-one years after the *drawing*," *&c.*

On the whole, we think it quite clear, that the Legislature had in view the day on which the land was drawn, and not the close of the lottery, as the period from which the limitation should commence its operation.

We are not insensible to the practical difficulties which may lie in the way of showing, by proper proof, the date of each "draw." And this certainly affords a plausible argument, that the close of the lottery, when the returns were made by the commissioners, should have been made the time from which the limitation should begin to run.

But we regard the language of the Legislature as so plainly expressing a different intention, that we must decide accordingly, and leave the matter and method of proof to those whose interests are involved, and to those whose duty it is to administer the law in the issuing of grants; simply adding, that the proof should, of course, be such as is consistent with the rules of evidence and principles of justice.

Let the judgment be affirmed.

No. 17.—THE LESSEE OF WM. GRIFFITH and others, plaintiffs in error, *vs.* JOHN G. WRIGHT, defendant in error.

[1.] A grant of letters of administration may be impeached by extraneous evidence, showing the Court of Ordinary, which made the grant, to have had no power to make it.

Ejectment, in Oglethorpe Superior Court. Tried before Judge ANDREWS, April Term, 1855.

This was an action by the heirs of George Griffith, against John G. Wright, for a part of a tract of land divided by the county line, between the Counties of Oglethorpe and Taliaferro, and upon which tract of land George Griffith lived prior to his death. The defendant set up title under a sale by one Glenn, as the administrator of George Griffith. The letters of administration were granted by the Ordinary of Taliaferro County, and did not recite that Griffith resided in that county at the time of his death. Counsel for the heirs of Griffith proposed to prove, that by an accurate survey of the county line, and by other evidence, that the residence of George Griffith, at the time of his death, was in Oglethorpe County; and hence, that the Ordinary Court of Taliaferro

County had no jurisdiction; and the letters of administration granted were therefore *void*. The Court refused to admit the evidence, on the ground that the letters could not be thus attacked, collaterally, in this case. This is the error assigned.

REESE; TOOMBS, for plaintiffs in error.

IRVIN & BARNETT, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] The fourth section of the Act of 1839, "to make it the duty of the Clerks of the Court of Ordinary" to preserve evidence, &c. is in the following words: "Sec. IV. In all cases hereafter, letters of administration shall only be granted by the Court of Ordinary of the county where the deceased resided at the time of his death, if a resident of this State."

Under this section, the Court of Ordinary of the county in which George Griffith resided at the time of his death, was the only Court of Ordinary in the State which had power to grant letters of administration on his estate. If, therefore, Taliaferro was not that county, the Court of Ordinary of Taliaferro had no power to grant the letters of administration on his estate, which it did grant; and the grant of such letters was "a mere nullity." (*Towns, Gov. vs. Springer and others*, 9 *Ga.* 130. *Beverly & McBride vs. Burke, do.* 446.)

Was it the right of the plaintiffs to show, by such evidence as that which they offered, that George Griffith, at the time of his death, did not reside in the County of Taliaferro, but did reside in the County of Oglethorpe? This is the question.

The evidence offered by the plaintiffs, consisted not in the acts, recitals or proceedings of the Court of Ordinary of Taliaferro, but in other things. Nothing appeared on the face of any of the acts, recitals or proceedings of that Court to show where Griffith resided.

Now, if a want of jurisdiction in the Court is disclosed by something which is apparent on the face of the cause, there is

no dispute, I believe, but that any body may, collaterally or otherwise, if need be, avail himself of that something, to have the judgment rendered in the cause considered a nullity. *Case of the Marshalsea*, (10 *Coke*, 168.) In such a case a prohibition would go, even after judgment. (*Com. Dig. Prohibition D.*)

But when the want of jurisdiction is not so disclosed, whether that which would disclose it may, in some proceeding not begun for the special purpose of annulling the judgment, be shown by extraneous evidence, is a question about which there is less of certainty.

One of the two answers to the House of Lords, given by the Judges in the Duchess of Kingston's case, was "that a sentence in the Spiritual Court against a marriage, in a suit of jactitation of marriage, is not conclusive evidence, so as to stop the Counsel for the Crown from proving the marriage, in an indictment for polygamy." The main reason which is given for this answer is, that "the parties are not the same." (2 *Smith's Lead. Cases*, 432, 428.) This reason is sufficient to sanction the proposition, that judgments in the Spiritual Courts are conclusive upon none except the parties and their privies; and therefore, that such judgments may, by all other persons, be attacked, and that with extraneous evidence, not merely on the ground of a want of jurisdiction in the Court to render them, but on any other ground which may show that they should never have been rendered. Whether, however, a proposition going this length would not be going too far, may admit of a doubt. I question, myself, whether such a proposition would be going farther than would be warranted by the case of *Brown and another vs. Wright*, (5 *Ga. R.* 29.) But that anything which would show a *want of jurisdiction* in such Courts may be proved by extraneous evidence, is a proposition that seems to pass unquestioned. In *Allen vs. Dundas*, (3 *D. & E.* 130,) *Buller*, J. says, "secondly, the probate is conclusive till it be repealed; and no Court of Common Law can admit evidence to impeach it. Then, this case was compared to a probate of a supposed will of a living

person; but in such a case, the Ecclesiastical Court have no jurisdiction, and the probate can have no effect." "The distinction in this respect, is this: if they have jurisdiction, their sentence, as long as it stands unrepealed, shall avail in all other places; but where they have no jurisdiction, their whole proceedings are a nullity." And accordingly, this is laid down as the general doctrine by Smith, in his notes to the Duchess of Kingston's case. (2 *Smith's Lead. Cas.* 440.)

This same doctrine is true, also, of foreign judgments and judgments rendered in the British Colonies, and in Ireland and in Scotland. (*Id.* 442–3.)

The Courts of Ordinary occupy, in Georgia, the place which, in England, is occupied by the Spiritual Courts. The law, therefore, applicable to the latter, has, in general, been adopted by the State for the former.

It follows, therefore, that a judgment of the Court of Ordinary granting administration, may be impeached by extraneous evidence, showing the case to have been such that the Court had no power to grant the administration.

If this be so, the evidence which was rejected in this case should have been admitted; for the evidence was such as would have gone to show that the man (Griffith) on whose estate the administration had been granted, was not, at the time of his death, a citizen or resident of the County of Taliaferro, the Court of Ordinary of which county had granted the administration, but of the County of Oglethorpe. And if this had been proved, then, according to the Statute aforesaid, that would have been proved which would have shown the Court to have been without power to make the grant of the administration.

We think, therefore, that a new trial ought to be had.

No. 18.—Young L. G. Harris and others, executors of S. W. Allen, deceased, plaintiffs in error, *vs.* Jane L. Allen, defendant in error.

[1.] Interest can be charged on advancements, only from the time they are brought into hotchpot.

In Equity, in Elbert Superior Court. Decision by Judge Andrews, at March Term, 1855.

The bill of exceptions and record in this case make but a single question. The testator, Singleton W. Allen, directed that his estate should be distributed according to the Statute of Distributions. He had, during his life-time, largely advanced several of his children. Upon a settlement of his estate, the question was, whether interest should be charged on these advancements from the date of the death of testator, to the time of distribution. The Court below held that interest was so chargeable, and this is the only error assigned.

T. R. R. Cobb, for plaintiff in error.

T. W. Thomas, for defendant in error.

By the Court.—Starnes, J. delivering the opinion.

[1.] We believe that this point is, in plain terms, controlled by our Statute of December 25th, 1821. But we also incline to think, that without this Statute, and upon elementary priciples, interest cannot be allowed on these advancements.

Interest is a penalty or compensation for the withholding of a debt. It cannot, therefore, properly be charged on these advancements from the death of the testator, unless they are in the nature of debts. Are they so?

On the contrary, property *advanced* by the father to a child, vests absolutely in the latter. This seems to be reasonable and just, when we reflect that it is given in lieu of that which the duty of maintenance previously required to be furnished, and is in anticipation of what the child might inherit. It often goes as a marriage portion, or consideration of marriage, with the child. Indeed, it only becomes an *advancement* by being given absolutely. Hence, we are told, in direct terms, that "such a provision as shall be construed an advancement, must result from a complete act of the intestate, in his lifetime, *by which he divested himself of all property in the subject.*" *Edwards vs. Freeman*, (2 *P. Wm.* 440. *Toller*, 380.)

If we examine the rules which governed the *collatio bonorum* of the Civil Law, from which we have derived the doctrine of advancements, &c. we will find that property given by the father, by way of advancement, to his children, vested absolutely in them when emancipated. (*Dom. Civ. L. Part* 2, *B.* 2. *Tit.* 4, *Sec.* 2944.)

This being so, it would seem that interest cannot be legally charged on such an advancement, until the child divests himself of his absolute title to the property, by bringing it in for distribution.

But whatever may be thought of the question, upon principle, we do not see how there can be any doubt as to the provisions of our Statutes, which expressly declare that "such advancements, when brought into hotchpot, shall be estimated according to the value of the property at the time such advancement was made, and no interest allowed thereon." (*Act of December 25th*, 1821. *Cobb, N. D.* 294.)

No interest allowed thereon *when?* "When brought into hotchpot," answers the Statute. Nothing can be plainer.

It was urged by the Counsel for the defendant in error, that, unless interest was thus reckoned, very great inequality might result in making distribution; and that there would be a want of certainty in the rule adopted, as the time of distribution would be indefinite, and the child might defer the

rendering of his portion into hotchpot to the latest possible moment.

The illustrations presented by the intelligent Counsel for the defendant in error, certainly show that inequality might result, if interest were not estimated from the death of the father. But other illustrations very plainly show that inequality in the distribution may result, although interest be calculated on the advancement from that period; and it can be readily seen that the effort to produce equality in such a case, must prove a fruitless task, unless all the interest accumulated by the child, were calculated from the time the advancement was received; yet, no one thinks of insisting on this.

Why, then, should a Court adopt a rule for the sake of equality and equity, which, whilst it violates fundamental legal principles, does not certainly result in either?

The truth is, it does not necessarily follow, that there will be an accumulation of the sum advanced; but if there be, it is proper that it should belong absolutely to the child; for it may be the fruit of his energy, his industry, or his ability. And the inequality of which complaint is made, necessarily results from the nature and incidents of property.

The difficulty suggested, as to the indefiniteness or uncertainty as to the time when the portion may be brought into hotchpot, is an argument from *the inconvenience of the matter*. But this cannot authorize a repeal, by construction of the plain provisions of the Statute. Such would be the result, if interest were allowed before the portion was brought into hotchpot. The *argumentum ad inconvenienti* may be resorted to when the meaning of a Statute is doubtful. But it is of no service when the terms of the Act are plain.

Besides, the uncertainty is not so great as suggested. The distributee must elect to bring his portion into hotchpot, and give notice to this effect, to the administrator, before distribution. And if the time when he thus gives notice, be assumed as the period when the portion is brought into hotchpot, (and

this may be done in strict accordance with legal principles, the inconveniences pointed out would be obviated.

A Statute passed by our last Legislature, now fixes the "time of distribution" as that at which the portion must be brought into hotchpot. (*Acts of* 1853–'4, 41.) As a consequence, for the future, it will be necessary to declare, with something of certainty, what is meant by *the time of distribution*. This may be easily done, by holding, that the time of the first distribution contemplated by law, was intended as the time when the portion is to be brought into hotchpot.

Let the judgment be reversed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA.

AT AUGUSTA,

JUNE TERM, 1855.

Present—JOSEPH H. LUMPKIN, EBENEZER STARNES, HENRY L. BENNING. } *Judges.*

No. 19.—WM. I. WAY, plaintiff in error, *vs.* RICHARD J. ARNOLD, defendant in error.

[1.] If a deed is made, referring to the land conveyed as having such shape, marks and boundaries as is represented by a plot of re-survey made the day of as by reference to said plot will more fully appear, parol evidence is admissible to identify the re-survey.

[2.] A witness cannot, by the subsequent voluntary creation of an interest, without the concurrence or assent of the party, deprive him of the benefit of his testimony, if the interest were acquired wantonly or fraudulently.

[3.] The pendency of a suit cannot prevent third persons from transacting business, *bona fide*, with one of the parties; and if an interest, in the event of the suit, is thereby acquired, the common consequence of law must follow: that the person so interested cannot be examined as a witness for that party, from whose success he will necessarily derive an advantage. (*Pr. Ld. Ellenborough*, 3 *Camp.* 381.)

[4.] Where a person is called as an original witness to some transaction or agreement between the parties, in whose testimony they both have a common interest, it seems to be agreed, that it shall not be in the power of either of the witness or of one of the parties, to deprive the other of his testimony, by reason of any interest subsequently acquired, even though it

were acquired without any such intention on the part of the witness or of the party: *Aliter*, where the witness was not the agent of both parties, or was not called as a witness of the original agreement or transaction.

[5.] After the Jury have retired to their room for consultation, they are not entitled to have sent out to them a plot, exhibiting several marked lines, some of which are legal, and were admitted in evidence, and others illegal, and therefore rejected.

[6.] A conveyance to land, which is held at the time *adversely* by a third person, is contrary to the Statute of *VIIIth Henry* against maintenance, and void.

[7.] Under modern conveyances, with or without warranty, title to land subsequently acquired, does not pass to the grantee by *estoppel*.

[8.] Are not our Registration Acts a virtual repeal of the doctrine of *estoppel? Quere.*

Ejectment, in Bryan Superior Court. Tried before Judge HOLT, April Term, 1855.

This action was brought by Way against Arnold. The former was the owner of a tract of land known as *Silk Hope;* the latter was the owner of a tract of land adjoining, known as *Sedgefield.* Both claimed title under Edward Pyncheon. The deed from Pyncheon to Way was dated 2nd April, 1844, and conveyed a tract of land "known as Silk Hope, bounded on the north by the Great Ogechee River; east by the lands of Richard J. Arnold, Esq.; south by Major George M. Waters, and west by Col. Lewis Morris, having such shapes, marks and boundaries, both natural and artificial, as is represented by a plot of re-survey, made the day of as by reference to said plot will more fully appear." No plot was attached.

On 8th January, 1845, Lewis Morris conveyed Sedgefield to Edward Pyncheon; and on 31st March, 1845, Pyncheon conveyed it to Richard J. Arnold. The dispute arose as to the dividing line between *Sedgefield and Silk Hope.*

On the trial of this cause, it appeared that Arnold, in order to obtain the testimony of *Morris*, had released him upon his warranty to Pyncheon. Plaintiff below offered in evidence the depositions of Edward Pyncheon, for the purpose of iden-

tifying a plot of re-survey, made by Zara Powers, D. S. dated 27th February, 1829, as the plot referred to in the deed from Pyncheon to Way. Defendant's Counsel objected—1st. Because Parol evidence was inadmissible to identify this plot. 2nd. Because Pyncheon, being the warrantor of Way, and being released upon his liability as warrantor of Arnold, was an interested witness until released.

The Court below excluded the testimony on the first ground, without deciding the last; and to this decision plaintiff's Counsel excepted. Other exceptions were filed to other decisions, but all dependent on this, except the following:

One Hughes, the County Surveyor, made a plot of survey of the *Silk Hope* tract. All except one line, was based upon the re-survey excluded as above. The plot was admitted as to that line only. The Jury requested to have this plot in their room. The Court refused the request, and exceptions were filed.

On these exceptions error has been assigned.

MILLEN, for plaintiff in error.

WARD, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

This was an action of ejectment, brought by William J. Way, against Richard J. Arnold, to recover a few acres of land in Bryan County. The plaintiff and defendant are contiguous owners of two tracts, the one known as Silk Hope, the other as Sedgefield. They mutually bound each other—the former situated on the east and the latter on the west—and the suit between these parties, has originated in a dispute or difference as to the true line between these two plantations. It is admitted, and abundantly shown by the testimony, that an old canal or ditch, which runs from the hill to the creek, once constituted the dividing line between the rice-fields of the Silk Hope and the Sedgefield places. But it is insisted, that in

the course of the various conveyances which have been subsequently made, the original line has been changed and another substituted in its place. Confine the plaintiff to the ancient boundary, and the case is with the defendant. Establish the new line, beginning in 1844 and 1845, and Mr. Way is entitled to recover the premises in dispute.

As both plaintiff and defendant derive title from Edward E. Pyncheon, it is unnecessary to go back beyond their common grantor.

The first link in the plaintiff's chain of title, is the Sheriff's deed to Pyncheon, dated the 4th day of July, 1843, and conveying all of Silk Hope to the grantee, his heirs and assigns forever. To which no objection is made. The next is a deed from Pyncheon to Way, executed the 2d day of April, 1844, conveying Silk Hope and calling for the land of Col. Lewis Morris, (Sedgefield,) on the west, and described as "having such shape, marks and boundaries, both natural and artificial, as is represented *by "a plot of re-survey made the ——— day of ———, as by reference to said plot will more fully appear.*" The plaintiff next read in evidence, a deed from Lewis Morris to Edward E. Pyncheon, dated the 8th day of January, 1845, conveying the whole of the place known as Sedgefield. He then submitted to the Jury a deed to Sedgefield from Pyncheon to Arnold, dated the 31st day of March, 1845. Mr. Way then offered in evidence the testimony of Pyncheon, taken by commission, and particularly his answer to the second direct interrogatory, which is in the words following, to wit: To the second interrogatory, the witness answers—"The plot of re-survey, signed Zara Powers, D. S. and dated February 27th, 1829, and now shown to me, is the one by which I bought and sold Silk Hope." And the plaintiff moved the Court that the same might be admitted to prove that this was the plot referred to in the deed from Pyncheon to Way. To its admission, Counsel for defendant objected that it was parol proof, offered for the purpose of supplying the omissions in a deed, and that the identity of the plot could not be thus shown; and because, also, Pyncheon was an inter-

ested witness. Whereupon, the Court excluded the testimony, not upon the ground that the witness was interested, but that the testimony was illegal. To which decision, Counsel for plaintiff excepted.

The plaintiff then offered in evidence the plot of re-survey, signed Zara Powers, D. S. together with the aforementioned proof, and moved the Court that the same might be admitted, to prove the *locus in quo*, or subject matter of the conveyance from Pyncheon to Way; and this being a dispute as to boundary, to ascertain what were the true boundaries of Silk Hope. To which being admitted in evidence, Counsel for defendant objected, and the Court excluded said testimony—Counsel for plaintiff excepting thereto.

The plaintiff then offered in evidence the said plot of re-survey, made by Zara Powers, D. S. and dated as aforesaid, and moved the Court that the same might be received as a muniment of title, and admissible before the Jury. To which being admitted in evidence, Counsel for defendant objected. And the Court, upon said objection being made, excluded the same, and Counsel for plaintiff excepted.

The said plaintiff then offered in evidence the testimony of William Hughes, County Surveyor of Liberty County, by commission, legally taken, accompanied by a plot of the dividing line between Silk Hope and Sedgefield plantations, drawn by witness, and annexed by witness to his interrogatories, and moved said Court that said testimony and plot might be received in evidence, to prove what were the true and correct, natural and artificial boundaries of Silk Hope plantation, and the true line of division between Silk Hope and Sedgefield plantations; and that witness derived his knowledge of the boundaries in a survey made at the instance of plaintiff and defendant, with the plot of re-survey mentioned above, and the title deeds of both parties placed by them in his hands, for the purpose of ascertaining said boundaries, and also to prove that the said plot of re-survey, signed Zara Powers, D. S. and dated as aforesaid, was a recognized plot of Silk Hope plant-

sion; (a copy of which testimony and plot is hereunto annexed;) to the admission of which testimony and plot, so far as it relates to the boundary derived from the re-survey signed, Zara Powers, Counsel for defendant objected, upon the ground that witness derived his knowledge of these boundaries from a survey made in accordance with the plot of Zara Powers; and said plot being ruled out, this evidence and the plot herewith offered, must be also excluded; and upon said objection being made, the Court excluded said testimony and plot, and Counsel for plaintiff excepted.

The said plaintiff then offered in evidence such portion of said testimony, and the plot aforesaid, as referred to line run according to Mr. Arnold's deed, and no objection being made, the said testimony was received. (A copy of which is hereunto annexed.)

John P. Hines was then sworn as witness for plaintiff, who testified, that when Silk Hope plantation was owned by Lewis Hines, in 1839 or '40, a half acre on the island was always claimed and used as belonging to said plantation, and has always been so regarded by the subsequent owners; that the line of boundary, relative to the balance of the premises in dispute, was always a matter of difference between the owners of Sedgefield and Silk Hope; that the land could produce sixty bushels of rice per acre, and is worth twenty dollars per acre, per annum. Counsel for plaintiff then asked witness, whether he had not always known of a plot of re-survey of Silk Hope plantation, signed Zara Powers, D. S. and dated the 27th February, 1829, and whether the plot then shown him, was not that plot? To which question, Counsel for defendant objected, and the Court sustained said objection. Counsel for plaintiff excepted.

The cause being closed, and the Jury having been charged with the cause, the Jury retired; and having been absent some time, requested that the plot, drawn by William Hughes, and partly admitted in evidence, might be sent to them; Counsel for defendant objecting thereto, the Court refused their request, and Counsel for plaintiff excepted.

The whole of the errors assigned in this case, except the last, may be considered and disposed of together. Because, if the Court was right in refusing to admit the re-survey, as proven by Pyncheon, there was no error, of course, in excluding from the Jury said plot of re-survey; the testimony of Wm. Hughes proving the boundaries, both natural and artificial, of Silk Hope plantation, and the true line of division between Silk Hope and Sedgefield; in excluding from the Jury all the lines drawn upon the plot of William Hughes except the line drawn according to the deed of the defendant; and the testimony of John P. Hines, proving that the plot of re-survey, signed Zara Powers, D. S. dated February the 27th, 1829, and then shown to him in Court, was a recognised plot of Silk Hope plantation. If, on the other hand, the Court was wrong in excluding so much of the testimony of Edward R. Pyncheon, as identified the plot of re-survey, purporting to have been made by Zara Powers, as the one by which he bought and sold Silk Hope, all the rest of the rulings were wrong. On the first exception, therefore, hang all the balance save the last.

[1.] Was the Court right, then, in refusing to allow the re-survey to be identified by Pyncheon? Is it too vague and indefinite to be established by *aliunde* proof? It is insisted in the argument before the Court, that when one writing refers to another, it must, if you would incorporate the one referred to into the other, and make it a part of it, so describe it as that when produced, it would identify itself. Here it is contended, that there are no marks, whatever, to distinguish this re-survey from any other.

We have examined, with some care, the elementary treatises upon evidence, as well as the reported cases upon this subject, and the result of our investigation is, that much confusion and contradiction prevails upon this branch of the law. Attempts have been made to distinguish between patent and latent ambiguities, and the position taken is, that while the latter are susceptible of explanation by extrinsic testimony, that patent ambiguities are not. But both *Mr. Starkie and*

Mr. Greenleaf make so many exceptions to the rule, disallowing parol proof, to supply what is defectively expressed in the writing, that the rule itself is virtually abrogated.

Had the date of this re-survey been supplied, the objection, it seems, would be considered as removed. And yet, who does not see that there is still the same danger existing, though not to the same extent, in identifying the plot? Suppose the reference in the deed, from Pyncheon to Way, had been "to a re-survey this day delivered from the party of the first part to the grantee," who can doubt that parol evidence would be admissible what re-survey was referred to?

Take the common case put, and which all the authorities concur in holding is susceptible of parol proof, namely: where a man devises property to his cousin, A B, and he has two cousins of that name, it has never been doubted but that parol evidence will be received in such case, to explain the ambiguity, and show which of the two cousins was intended. And yet, in every such case, you make the will *pro tanto* of the testator; and it is no answer to say, so far as principle is concerned, that the uncertainty is produced by something outside of the will, and, consequently, may be explained in the same way. The truth is, you cannot execute the will without going out of it; and whenever you do this, the parol poof, and not the instrument, is the will which is set up.

Mr. Greenleaf says, "it is only in this mode that parol evidence is admissible (as is sometimes, but not very accurately said,) *to explain written instruments*, namely: by showing the situation of the party in all his relations, to persons and things around him; or, as elsewhere expressed, by proof of the surrounding circumstances. Thus, if the language of the instrument is applicable to several persons—to several parcels of land—to several species of goods—to several monuments or boundaries—*to several writings, or the terms be vague and general;* in all these and the like cases, parol evidence is admissible of any extrinsic circumstances, tending to show what person or persons, or what things

ere intended by the party; *or to ascertain his meaning in* ny *other respect.*" (1. *Greenleaf's Ev.* §288.)

And the author, in the preceding section, (287) cites this ase of *Bell vs. Martin*, (3 *Harrison's R.* 167,) with approba-on. "So, if a contract, in writing, is made for extending ie time of payment of" certain notes "held by one party gainst the other, parol evidence is admissible to show what otes were so held and intended." And again, in the notes—parol evidence is admissible to show what debt was re-rred to in a letter of collateral guaranty. *Drummond vs. extruan*, (12 *Wheaton*, 515.) So, to show what flats were cupied by the riparian proprietor, as appurtenant to his land and wharf, and passed with them by deed." *Treat *. Strickland*, (10 *Shepl.* 234.)

If these elementary *dicta* and decided cases be law, they e certainly broad enough to let in the testimony of Pyn-ieon, provided it be unexceptionable otherwise.

[2.] Was Pyncheon a competent witness to identify this cument? Being the common warrantor of both plaintiff id defendant, he stood indifferent between them. But in der to obtain the testimony of Lewis Morris, who sold dgefield to Pyncheon, with warranty, Arnold, the defend-nt, released Morris; and consequently, discharged Pyn-ieon, the subsequent warrantor; so that Pyncheon, when fered as a witness, was liable over to Way only, upon his arranty of Silk Hope; and Way refused to release him. nd now, the ground is taken by Way's Counsel, that Pyn-ieon being originally a good witness for them, it was not in s own power, nor in the power of Arnold, to disqualify him. nd there is much doctrine to be found in the books to this fect.

It originated, no doubt, in an effort, on the part of the ourts, to get round the old rule of the law, happily the rule no longer in *England*, which excludes an interested witness om testifying.

[3.] It is a mistake, however, to suppose that this doctrine well settled, and settled, too, as contended for by Counsel

for plaintiff. It is twice referred to by Mr. *Greenleaf.* (1 *Greenleaf's Evidence*, §§167, 418.) And while he lays down the general rule, that the witness cannot, by the subsequent, voluntary creation of an interest, without the concurrence or assent of the party, deprive him of the benefit of his testimony; yet, the learned Professor adds, that this rule admits of a qualification, turning upon the manner in which the interest was acquired. "If," says he, "it were acquired wantonly or by a wager, or fraudulently, for the purpose of taking off his testimony, of which the participation of the adverse party would *generally* be proof, it would not disqualify him." "But," quoting the language of Lord *Ellenborough* in 3 *Camp.* 381, "the pendency of a suit cannot prevent third persons from transacting business, *bona fide*, with one of the parties; and if an interest, in the event of the suit, is thereby acquired, the common consequence of the law must follow, that the person so interested cannot be examined as a witness for that party from whose success he will necessarily derive an advantage."

The rule thus laid down by *Ld. Ellenborough*, has been recognized in the Courts of several of the United States; and in *Winship vs. Bank United States*, (5 *Peters*, 529, 552,) the learned Judges of the Supreme Court were divided upon it. Believing, as we do, that it is founded in good reason, we hold that Pyncheon is disqualified without a release. Is he not interested? And can an arbitrary rule of evidence relieve him from that predicament, which excludes all other witnesses from giving testimony?

[4.] Had he been originally called to witness some transaction between these parties; and thus, creating in both of them a common interest in his testimony, there would seem to be some propriety in maintaining that it should not be in the power of the witness, himself, or of either one of the parties, to deprive the other of his testimony, by reason of an interest subsequently, acquired even though it were acquired without any such intention on the part of the witness or of the party.

But no such fact exists here. Mr. Pyncheon was not the agent of both of these parties, nor was he called on to witness any transaction or agreement between them. Moreover, the release here is to Morris and not to him. Mr. Pyncheon has done nothing—Mr. Arnold has done nothing, as it respects Mr Pyncheon, directly, to render him incompetent, and thus, to deprive Mr. Way of the benefit of his testimony. And it is not pretended but that the release of Arnold to Morris, which has operated to discharge Pyncheon upon his warranty to Arnold, was executed in the utmost good faith; nay more, it was indispensable to the defendants' case.

Our judgment therefore is, that the Court was right in refusing to permit the Powers plot to be identified by the evidence of Edward E. Pyncheon, as that referred to in his deed to Way, and by which he bought and sold the Silk Hope plantation. And consequently, was right upon the next five grounds in the assignment of errors.

[5.] Upon the last assignment, we hold the Court was right in refusing to send to the Jury the plot drawn by William Hughes and partially admitted in evidence, when requested by that body. This plot exhibited three lines—one of which was drawn in accordance with the deed of defendant—the other two from the Powers plot, which had been excluded. Whether this paper could have been sent out, according to the practice of some of the Courts, even had it contained nothing objectionable, is doubtful. But that it was inadmissible in the condition in which it stood, there can be no question. One of the three lines run and marked upon it was legal, and admitted without objection; the other had been ruled out as illegal; and it was apparent that the Jury desired the inspection of this re-survey, which was private and without notice, in reference to those very lines which had not been established. The point is plain.

As the suit to recover this land may be renewed, provided Mr. Way can procure any other witness by whom this re-survey may be identified, or effect the same object, by relieving Mr. Pyncheon, it may be advisable to notice two posi-

tions occupied by Col. Ward, Counsel for the defendant below, and in this Court.

[6.] The first is, that conceding the re-survey to be properly proven, and that it constitutes a part of the deed from Pyncheon to Way, and operates as a conveyance to the parcel of land covered by it outside of the old boundary; still, he argues, that as Col. Lewis Morris, the then proprietor of Sedgefield, from which this strip of land is taken, held the same adversely, that the deed thereto from Pyncheon to Way was void, by the Statute of *Henry VIIIth.* against maintenance.

Whether the possession of Col. Morris was adverse to this portion of the premises, is a question of fact to be found by the Jury. If he were, we see no reason why the doctrine contended for should not apply.

[7.] Again, Counsel for the defendant in error contends, that as Mr. Pyncheon did not own any part of Sedgefield, when he sold to Way, that he could not convey title to any portion thereof to Way. To this, the learned Counsel for Way replies, that Pyncheon, having, subsequently to his sale to Way, purchased the whole of Sedgefield from Morris, that the title of Way attached forthwith to the ground in dispute; and that not only Pyncheon, but Arnold, claiming Sedgefield under him, are estopped from disputing Way's title.

This whole doctrine is most elaborately examined by *Mr. Smith*, in the 2d Volume of his *Leading Cases*, commencing at page 454, and continued *ad finem*. And the conclusion of the whole matter is, that where lands are sold by any of the modern conveyances, in which the grantor had nothing at the period of executing the deed, the title which he may subsequently acquire, does not pass to the grantee by *estoppel;* nor entitle him to recover in ejectment brought against a stranger. That a conveyance, made under such circumstances, does not debar the warrantor or his heirs, from recovering under any right or title not vested in the grantor at the time of making the conveyance; that otherwise, no estate would be safe from the fraudulent sale of an ancestor or the

prodigality of a son; that the doctrine of *estoppel* in deeds, cannot be based upon that of warranty; that in no case can this doctrine be made to operate against a purchaser without notice and for valuable consideration; and that if it be held in any of the States of this Union, that there can be passed to a mere stranger, by way of grant or release, or under the Statute of Uses, a full, legal title to land subsequently acquired by the grantor, but not vested in interest in him, at the time of the grant, the reason for its transmission must be sought in peculiar custom or particular legislative enactment, *and not in the Common Law, nor under the Statute of Uses.* And few things, adds the author, can be more obvious, than that without the check imposed by the principles above stated, the operation of the doctrine of *estoppel*, upon Common Law titles, could not have been endured for a year.

[8.] We are strongly inclined to the opinion, that our Registry Acts, under the modern form of conveyancing, is a virtual repeal of the doctrine of *estoppel*. At any rate, we are quite clear, that notwithstanding Pyncheon sold to Way with warranty, and afterwards bought Sedgefield of Morris, that this after acquired interest did not feed the estoppel, to use the technical jargon of the books, and pass the property in controversy, immediately to Way. If Pyncheon, upon consideration, conveyed this subsequently acquired interest, and such was his intention, Equity will decree a title to the after acquired estate, and the second grantee, Arnold, provided he purchased with notice, would be affected by said notice, and could not conscientiously hold the land in dispute.

No. 20.—HENRY C. KEENER, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

[1.] It is too late, after verdict, to move for a new trial on account of the incompetency of a Juror, whose disqualification was known to the prisoner before trial, and waived.

[2.] A defendant in a criminal case, is entitled only to a list of the witnesses sworn before the Grand Jury.

[3.] Ordinarily, a witness who testifies must state facts, and not his opinion or expectation, which is the conclusion of his mind, from the facts.

[4.] Where the character of a party, as to any particular trait, or as developed under special circumstances, is put in issue, it would seem that it should be established by evidence, as to general reputation, and not positive evidence of general bad conduct. Is there any material difference as to the two modes of proof? *Quere.*

[5.] All the circumstances of a transaction may be submitted to the Jury, provided they afford any fair presumption as to the matter in issue.

[6.] When previous threats, without any overt act, are sought to be introduced by the defendant, by way of justification, it must be shown that they had been consummated: *Aliter*, if used merely to show the state of mind or feeling on the the part of the deceased.

[7.] The remoteness or nearness of time, as to threats pointing to subsequently committed, can make no difference, so far as the competency of the testimony is concerned.

[8.] The duty of Courts in giving in charge to the Jury the law in criminal cases.

[9.] Verdicts find the *criminal* and not the *naked* fact; and to make a whole or a legal verdict, the Jury must find, for itself, the conclusion of law upon the facts.

[10.] If one kills another, under the fears of a reasonable man, that the deceased was manifestly intending to commit a personal injury upon him amounting to felony, the killing is justifiable homicide; if the prisoner is under similar fears of some injury less than a felony, the offence is manslaughter, and not murder.

Indictment for murder, in Richmond Superior Court. Tried before Judge HOLT, January Term, 1855.

Henry C. Keener was placed upon trial for the murder of James Reese.

When the name of James Sikes, a Juror, was called, h

was put upon the *voire dire* and answered negatively, all the questions required to be propounded by law. He was put upon the prisoner, accepted by him, and sworn in chief to try said cause.

When the name of Samuel A. Verdery was called, he was put upon the *voire dire*, and in answer to the question, "Have you, from having seen the crime committed, or having heard any portion of the evidence delivered on oath, formed and expressed any opinion as to the guilt or innocence of the prisoner at the bar?" Said Juror answered that he had not, but that he had formed and expressed an opinion from what he had heard of the case. He answered the other questions negatively. The Attorney General pronounced the Juror competent, and he was accepted and sworn in chief, to try said cause.

In the progress of the cause, the Attorney General offered as an original witness, on the part of the State, one William A. Archer, whose name was not in the list of witnesses sworn before the Grand Jury, nor among those of whom the defendant had notice. Counsel for prisoner objected to said Archer's being sworn as an original witness on the part of the State, for those reasons. The Court over-ruled the objection, and Counsel for defendant excepted.

On the cross-examination of the State's witness, Goodwyn, Counsel for defendant propounded the question: "Whether the tone of voice, with the language and manner of deceased, at the time he walked through the piazza to the room in which the defendant was, were not such as caused him to expect or look for a difficulty?" The Court refused to allow the question to be asked, objection having been made by Counsel for the State, the Court holding that the witness could not give his opinion, but could only state the facts, which was sufficiently done by saying that the language was harsh and excited his attention. To which ruling, Counsel for prisoner excepted.

Counsel for prisoner having asked the witness, Prater, "whether he was acquainted with the general character of

deceased for violence in the place where the difficulty occurred," objection was made by the Counsel for the State. The Court, thereupon, refused to allow the question to be asked; to which ruling, Counsel for prisoner excepted. And the further question having been asked—"What was the character of deceased for violence in that particular place," and objection thereto having been made by Counsel for State, the Court refused to allow the question to be asked; to which ruling Counsel for prisoner excepted.

A witness, Cosby, was introduced and sworn on the part of the prisoner, and testified as follows:

JAMES COSBY, sworn for prisoner. Witness: On Friday night before the death of Reese, witness went in United States Hotel bar room and found Reese in there, and walked out into the hotel with him (Reese); he then remarked that he had not seen me on McIntosh street for a good while; witness replied that he had not been there for about 10 months; Reese then said that he did not go there as frequent as he used to do—that Keener had taken his woman from him; and he said that Keener was a damned coward, and that he had made him leave there two or three times, and that if ever Keener crossed his path he would kill him; he then said he was going out before long and kick up hell out there; this was either the Thursday or Friday night before his death; we then turned and walked down the street, and there was no more said about it.

The witness was then turned over, for cross-examination, to Counsel for the State, who immediately moved the Court to strike out from the record and withdraw from the Jury, all of said testimony of said Cosby, which motion was allowed by the Court; whereupon, Counsel for prisoner excepted.

In his charge to the Jury, the Court failed, omitted and declined—although requested by Counsel for prisoner so to do—to read to the Jury, or comment upon the 12th and 13th sections of the 4th division of the Penal Code, upon which Counsel for prisoner had mainly relied for his defence. The Court having read the 1st, 2d, 3d, 4th, 6th and 7th sec-

tions, then charged the Jury, that "the section of the Penal Code, applicable to the grounds on which the defence had been placed, was as follows:" (reading the 15th section.) To which failure, omission and refusal to charge, and charge as given, Counsel for prisoner excepted.

The Court was also requested, by Counsel for prisoner, to charge the Jury as follows:

1st. That if they believed, from the evidence, that the prisoner, at the time of the commission of the act, was under the fears of a reasonable man, that the deceased was manifestly intending to commit a personal injury upon him, amounting to felony, the killing was justifiable homicide.

2d. That if they believed, from the evidence, that prisoner was under similar fears of some act of violence and injury less than a felony, his offence was manslaughter, and not murder,

Which charge, so requested, the Court failed and refused to give; to which failure and refusal, Counsel for prisoner excepted.

A verdict of guilty was rendered. Whereupon, Counsel for prisoner moved the Court for a new trial, upon the grounds, viz: The several rulings of the Court excepted to as above, and also upon the following ground:

Because James Sikes, one of the Jurors sworn in chief, did not stand indifferent between the State of Georgia and Henry C. Keener, said Juror having, previously to being sworn, expressed decided opinions in relation to the guilt of the accused, and such strong prejudice against the accused, as rendered him an incompetent Juror in law, and which were unknown to the accused or his Counsel until after the verdict was rendered, as will appear by the annexed affidavits, the said James Sikes having previously answered, negatively, the usual question on the *voire dire*.

The following is the testimony in the case:

TESTIMONY ON THE PART OF THE STATE.

EDWARD GREEN, sworn: Witness knows prisoner by sight. Was not present at the difficulty. It was in the City of Augusta, County of Richmond, State of Georgia. Was at the place between 7 and 8 o'clock in the evening where Reese was killed, at the house of Jane Yarborough, City of Augusta. Heard deceased's name mentioned. Some one tried to persuade prisoner to go away; said he would not; said he would kill or shoot the damned son of a bitch, whose name had just been mentioned, or any other rail road man. Prisoner alluded to Reese. Deceased was not there at that time, to my knowledge. These remarks were made in the back piazza of the house. Prisoner was sitting down at the time.

Cross: Did not know to whom prisoner was addressing. It was in the back stoop of the house. Heard Reese's name mentioned. There were several present. Does not think prisoner's remarks were, if the damned son of a bitch came there to run him off again, he would kill him. They were trying to get him off. Heard something said about Campbell Minstrells afterwards; supposed it be Campbell Minstrells from the name given them. Did not know what was said before he went in the house; left while they were talking. Said nothing about disturbing him. Said if he came there that night, he would kill or shoot the damned son of a bitch.

WILLIAM A. ARCHER, sworn: Witness knows defendant. Was present the night of the difficulty between Reese, deceased, and prisoner. It was in Richmond County in the early part of September last. Was there when Reese came in the parlor; he walked through into the back piazza—made some little noise, and hallooed out, "where is Keener, Yarborough's man?" I heard a voice which I supposed to be Keener's. I went out to where Reese was. Does not know Keener's reply. Mr. Reese was at the window, looking out on the back piazza. Reese went to the window and wanted

to go into the room where Keener was. Told him (Reese) to open and come in. Reese had a knife in his hand; apparently an old knife, about six inches long. Could not tell what kind of a knife it was; blade about six inches long; looked large for a pocket knife. It was tolerable dark. Reese was jobbing at the window with the knife, telling Keener to open, Keener telling him, "come in—you come in here, God damn you." Witness went and took hold of Reese; he jerked away from me. I took hold of him again, and asked him if he knew me. Said he did. Asked him to come away and not to raise any difficulty. He (Reese) said there would be no danger with a damned coward. Witness replied there was danger in a coward. Deceased said, "that is a fact," and went off. We walked off into the parlor peaceably, and sat down in the parlor. There was a deck of cards on the table. Witness picked up the deck and dealt off three cards apiece to himself and deceased. There appeared to be considerable moving about among the women. Sat there some little time. Heard some one stamp out in the piazza, and some one say "here I am." I went out in the piazza; saw Keener, and when I approached him he told me to stand off; I still approached nearer Keener, and he backed and told me again to stand off. Prisoner then called me and told me to come to him. Don't know whether he (prisoner) had anything in his hand at that time. Put my hand on his shoulder and commenced talking to him, and told him not to have any fuss there, and to go off; said he would not; that he had been run off several times; had been woke up out of his bed, time and again, and he did not intend to be run off any more. While we were talking in that way, Mr. Reese came out of the parlor, close by, within ten feet. Keener kept talking, but without speaking to Reese at all. Mr. Reese said, "you are afraid to point your pistol, you pusillanimous son of a bitch." Keener said, "what was that you said." Reese replied, "I said you are a pusillanimous son of a bitch." With that Keener raised his hand and shot with a pistol in his right hand. Prisoner then run. Witness

then went to Reese; asked him if he was hurt. Reese placed his hand to his belly and said he was shot. Witness helped Reese into the parlor. After I carried him into the parlor, he asked for water; gave him some. He took one swallow; laid him on the sofa; took him up and laid him on the floor. Witness sent for a physician as soon as he could. Physician came; it was Dr. Felder. I think Dr. Campbell was there. He was examined by the physicians. Two shot entered below the navel, and one shot struck deceased's watch. Witness remained there until Reese died. Thinks he lived about one hour. Do not know whose room it was that I heard the voice which I took for Keener's voice. Thinks it was the same room, the window of which Reese was jobbing his knife at. It was the room in the back part of the house; a person could get from that room; he could have gone into the street without going into the piazza, and could have gone into the piazza without going into the street. When I got to prisoner, he had the pistol in his hand; was not certain he had a pistol in his hand when he told me to stand back; had a stick in his left hand, walking stick, large stick; rather unusual size walking stick. Defendant was about four or five steps from deceased when he shot. Reese was still sitting down when he was shot, at the same place he was before he was shot. Saw no weapon in possession of Reese at that time; did not see any weapons on Reese after he was shot; he might have had some. Saw his pockets examined, and his money and watch taken. Saw Reese with a knife before the difficulty; saw no weapon about him after he was shot; does not know what Reese did with the knife he had at first; had nothing in deceased's hands at the time he was shot. Reese made no assault on Keener when he came out of the parlor, except in words. Jane Yarborough's house is called a whore house; that is the character of its inhabitants. One wound was a little below and to the right of the navel, about two and a half inches; the other wound was about five inches in the same direction. When Reese came out of the piazza, Keener was saying that he had been run off several times;

that he had been woke up out of his bed time and again, and would not do it any more. Never mentioned Reese's name. This was said before and after Reese came into the piazza. It was said loud enough to be heard by any one in the piazza. Reese never moved from the seat he took when he came into the piazza until he was shot.

Cross: When witness went to the window, Reese was jobbing at the window, demanding admittance—Keener replying, "you come in here God damn you." Reese saying, 'you open and I will come in." That was all Keener said at that time. Does not recollect any person being with him and Reese, at the time Reese was jobbing at the window. There were several in the parlor when witness and Reese were in there. There were several in the piazza; who they were he does not know; did not hear Reese ask any one for a pistol; was standing by Keener, dissuading him from having any difficulty, at the time of the shooting; was near enough to put his hand on him; knife blade was about five or six inches long; the knife was larger than an ordinary pocket knife. When I went out in the piazza Keener was talking of me, and said he would not run off from him any more, mentioning no name. Reese came out and took a seat on the bench. Witness understood, from prisoner's language, that it was Reese to whom he was referring when he said he would not run away any more.

By the State: Do not recollect how long it was from the time him and Reese went into the parlor, until he heard the tramp in the piazza; it might have been ten minutes.

By the prisoner: It would probably take ten minutes for a man to dress.

By the State: The killing of deceased happened in Richmond County, State of Georgia, about the 10th of September, 1854, (and that) after Reese was shot prisoner ran away. Witness left the cards in the parlor.

William P. Goodwin, sworn: Was present at the house of Jane Yarborough, at the difficulty between Reese and priso-

her, about the 10th of September last; knew nothing about the difficulty until some one, said to be Reese, came out of the parlor in the piazza; I was in the piazza; Reese walked up to door and kicked it; some one inside said, "come in;" there were some oaths; does not know who used them; is not certain which used them; the person inside said, "come in;" the person outside said, "open the door and I will come in." The person in the room remarked, "wait until I dress and I will come out." Reese then walked off from the door with a gentleman. Heard nothing more of it for ten or fifteen minutes. Some one came out of a door, said to be Keener, speaking very harshly; stamped, and said, "here I am," and remarked, that he had been run away from there before, but would not be run away any more. Had in one hand a stick and the other a pistol. Some one on the end of the bench said, "you are afraid to point your pistol, you pusillanimous son of a bitch." Keener asked him to repeat it. Does not know whether he repeated or not. Keener then raised his hand and shot, and then turned and run; saw no more of Keener. Then looked up to Mr. Reese, the man that was shot; he was getting up from his seat after the fire. Then went to leave there; had to go through the parlor. The person who was shot was in there reclining on the sofa; left the house immediately, and came up town: Knew neither of the parties at that time; they were both strangers to me; heard their names called; it was the only way I knew them. Did not notice any one at the window of the room, the door of which Reese kicked at. Never noticed any person close to Keener. There were several persons in the piazza at the time. Does not know Archer. First notice I took of Keener, was when he stamped on the floor and spoke loud; he then had a stick and a pistol. Prisoner was about five or six steps from deceased when he shot him; had been in piazza once before. Saw no weapon about Reese at any time that evening: Reese was sitting on a bench and made remarks. Prisoner told him to repeat it. Saw no assault made by deceased on the accused.

Cross: Heard the language, "where is your Keener?" Reese walked down to the room door. Reese was speaking harshly: went direct to the door. Reese's tone of voice was such as to attract the attention of witness; he spoke loud as he came down the piazza; was not looking at Reese when he was shot. When I looked at Reese after the shot, he was in the act of rising. Does not think that he said, on preliminary examination, that at the time of firing, Reese was in the act of rising. Immediately after the firing, and Keener turned, I looked and saw Reese in a rising attitude.

By a Juror: Keener came out of the door Reese kicked at.

By the State: Could see tolerably well by the light in the piazza.

WILLIAM L. FELDER, sworn: Witness is a practising physician; attended a gentleman said to be named Reese, at the house of Jenny Yarborough, on the 10th September, 1854; I arrived there about fifteen minutes after eleven o'clock; in the City of Augusta, County of Richmond; Reese was lying on his back, on the floor; his pantaloons unbuttoned; there was blood upon the shirt, asked where he was shot? was told he was shot in the abdomen; raised his shirt and saw two holes, apparently made by balls; one wound was a little below the navel, about 1½ inches; the other from 1½ to 2 inches below that, inclining to right; could introduce the end of the little finger; appeared to be made with large buckshot; attempted to probe the wound in a perpendicular direction, but could not; the probe went into the abdomen. Witness is of the opinion that deceased died from those wounds.

Cross: The position of a person in a rising attitude, favors the course of the balls.

By the State: Sitting and bending over would favor the course of the balls.

By the Prisoner: The course of those balls would be favored by leaning forward when sitting, or in a rising attitude; would not undertake to say, from the course of those balls, that deceased was sitting or rising, but if they went in a di-

root line, the course is consistent with either sitting and leaning forward, or in attempting to rise.

The State here closed.

TESTIMONY FOR DEFENDANT.

Emma Burns, Sworn: Was present at difficulty between James Reese and Henry C. Keener, about the 10th September last; Keener was very drunk in the forepart of the evening, cursing Campbell Minstrels; first saw Reese that evening on Jackson street, opposite Globe Hotel; between the hours of 10 and 11 that night, I saw Reese; he walked down to Miss Yarborough's with Capt. Moody and witness; Reese left us just before we arrived at Miss Yarborough's; Reese asked witness if she had heard Keener curse him and the rail road men, and said if he had, he (Reese,) would make him retract those words when he saw him; witness told Reese she minded her own business. Next saw Reese standing between the door and window in Miss Yarborough's piazza, with a knife in his hand and cursing, saying to Yarborough, "show up your Keener, I want to cut his damned throat;" Reese then drew his knife across Yarborough's bosom, and said he had just as soon cut her's as not; Reese then walked down to the end of the piazza, to the room which Keener was in; Reese then commenced pounding or kicking at the door; Reese wanted Keener to come out—called him out—witness cannot remember the words; Keener did not then come out; it was about ten minutes afterwards that Keener came out; Reese then went from the door to the window, before Keener came out, and made an effort to get into the room; Keener come out into the piazza—was cursing; Reese then walked out of the parlor into the piazza; Keener said he had been run off three times, and would not be run off again; Reese then walked down the piazza and asked some one if they had a pistol—who, she does not know; Reese then took his seat on the bench, with folded arms. At the same time Keener was talking, Reese called him a pusillanimous cowardly son of a

bitch. Mr. Archer had taken Reese from window once; was talking to Henry Keener. When Reese cursed Keener, Keener dared him to repeat it; Reese then repeated, "You are a damned, cowardly, pusillanimous son of a bitch; I dare you to point your pistol." Keener then fired.

When Reese was speaking to Keener, he was sitting on the bench, with his arms folded; at the firing, saw a movement; Reese said, "You damned, cowardly, pusillanimous son of a bitch, I dare you to point your pistol at me." After firing, Keener turned and ran; had seen Reese there about Saturday night fortnight before; he (Reese) came there with a party drinking, and asked for Keener as he usually did; Reese went to Miss Yarborough's room, and Keener jumped out of the window; don't remember what he said when he went to Yarborough's room; in the parlor he asked Yarborough where her man Keener was; "show up your Keener;" did not hear Reese use any violent language at the time Keener jumped out of the window.

One other time, Keener was there drunk; Reese was in a room; Keener did not go where Reese was, neither did Reese go where Keener was; Reese was standing at the door with pistol; there is one door to the room which Keener was in. (Diagram of the house exhibited to witness, and shown to the Jury.) Reese made a motion of his arm as he said, "I dare you to point your pistol." Witness was calm at the time.

Cross: Reese was at the parlor door, at a space between the door and window, when he said, "Show up your Keener;" was near the right hand window; did not see Keener when he came out of the room; was attracted by his cursing; was standing still; saw no pistol; had a stick in his right hand; saw the flash of the pistol; witness was standing at the parlor when the firing took place—at the left parlor window as I came into the piazza; was looking from one to the other; saw the flash of the pistol; Keener fired immediately after deceased called him a damned, cowardly, pusillanimous son of a bitch; Keener was about eighteen feet from deceased when he fired; Reese told Keener, when he (Reese,) first went to

the door to come out, that he (Reese,) was not armed. Reese was in the room of Martha Ruby in July last; the door was open at the time he placed the caps on the pistol. Does not recollect of having sworn on preliminary examination, before the Magistrate, on 13th November, 1854, at City Hall, Richmond County, as follows: "I saw Reese move around on bench; I was so excited I could not tell whether he turned around or not." Witness does not recollect using the word "excited," on preliminary examination; it must be a mistake of the Clerk. Witness has lived at Yarborough's off and on, about one year.

By the Prisoner: Received subpœna to attend Court in this case at Savannah.

AUGUTSUS PRATER, sworn: Witness had been acquainted with deceased for the last four or five years; has seen deceased at the house of Miss Yarborough; has met him there repeatedly; knows the reputation of deceased, as to violence in the neighborhood in which he lives; he was a passionate man when drinking; never saw him in difficulty when sober; would get into one with any one when drinking.

Cross: Has known deceased to get into a difficulty with witness; drew a sword cane on witness, but did not hurt him; has known him to have other difficulties in Atlanta; does not recollect the names of the persons he got into difficulties with; about four years ago; don't recollect of his having a difficulty in this county with any one else, except witness and Keener; the difficulty with Keener was at a whore house; at the time of the death of Reese, did not see it but heard of it; Reese was connected with the Georgia Rail Road at the time of his death, as witness believes, as conductor.

By the prisoner: In difficulty with witness and deceased, when he drew the sword cane, he did not hurt witness, but hurt Mr. Spencer; it happened at the house of Miss Yarborough.

WESLEY DONALDSON, sworn: Witness was at Miss Yarborough's about two weeks before Christmas, in the year 1853; in her bed chamber with Mr. Keener and herself;

while sitting, there came several persons to the front door; some one knocked at the door; Miss Yarborough asked who was there? The reply was, "a friend."

They then came to the room where we were sitting; knocked at the door several times, as if they were going to force the door, and demanded admittance; Miss Yarborough replied, she had company. Some one called out for Keener —"you damned coward!" "Bring out your man!" Then Miss Yarborough told the person at the door he was mistaken; that it was another gentleman in the room. Some one then kicked at the door very violently, as if to break it in. I stepped to the door and braced it; it was locked. While I was against the door, Mr. Keener took his hat and left by the other door; the other door leads into the parlor. There were then several of them shouted for Keener, and said, come out a damned coward, or they would break in the door. After Yarborough had closed the door, and I thought Keener had sufficient time to get out of the house, witness told them if they would wait, he would unlock the door and open it. Witness unlocked the door; Reese came in with a stick in his left hand and a knife in his right, and said he would kill Keener if he could find him; it was a bowie knife. Reese threatened Miss Yarborough's life for letting him escape, and said that if he ever caught him in the room with her he would kill him. After remaining in the room abusing Keener— calling every opprobious name, he (Reese) left by the same door; in a few moments we heard some one in the parlor who entered by the back door; Miss Yarborough opened the door and saw Reese; Yarborough called witness, and asked him to lock the back door after Reese left; after Reese stepped out witness locked the door.

Witness met Keener at the Shades next morning, and told him what I heard, and warned him if he went to Yarborough's house again. After Reese left, I heard several shouts for Keener, and heard several pistol shots; Miss Yarborough appeared to be alarmed, and asked if Keener was safe, and if he was gone. I told her he was. On Christmas day, in the

afternoon, I walked up to Miss Yarborough's. I walked in the back yard; went into the house by back door; Saw Yarborough and Reese standing in the passage; Reese kicked the door and called for Keener, a damned cowardly son of a bitch, to come out; it was a bed room door. Reese raised his stick over Miss Yarborough's head, and told her if she did not bring out her man Keener, he would kill her. Threatened to stamp her guts out if she did not bring out her man. Stood in the passage a few moments and heard Reese and Yarborough quarrelling. Walked out and went to pump, near by. When I got over to the pump I met Mr. Keener, and told him Reese was over at the house, threatening his life. Keener took hold of witness' arm and asked him to walk down town with him. I gave my assent and we then went; crossed over by the Infirmary, and came down to Jackson street. When we had proceeded some distance, we turned and observed Reese following him. Mr. Keener then quickened his pace. I then asked him if he did not think Reese would think he was afraid of him, if he saw him trying to get out of his way. Keener replied that he did not want any difficulty with him, and wanted to keep out of his way. We then reached Ganter's bar-room. Keener asked witness to take a glass; witness accepted the invitation, and walked into the bar-room with him; went in and took a glass together; also took a cigar. Mr. Keener then asked me to step to the door and see if I saw Reese. I then returned and told him I did not see him; thought he had passed. We then went to the Shades.

Cross: No one else was in the room with us at the time of the first difficulty; there were several persons in the passage; don't know who they were; there were several ladies in the house, viz: Miss Copperfield, Miss Irvin and Miss Brown; several others were there whose names I do not know; there were several persons at the door, whom he does not know; saw no one at the second difficulty except Reese and Yarborough; the doors were all closed. Witness believes the same ladies resided there at the time of the last difficulty as at the first one; saw them there before and after the last difficulty;

as brought here from South Carolina on the 22d December ast; has had no opportunity of conversing with prisoner. hile in jail; I saw him several times. Witness has been onvicted of simple larceny at this term of the Court, and lead guilty in second case; stealing negroes, as it appears; as been in jail here several times.

By a Juror: Was in Miss Yarborough's bed-room previous o the addition being put to the house; witness believes she ccupies another room.

JAMES COSBY, sworn: (Rejected by the Court.) On the Fri- ay night before the death of Reese, witness went in United tates Hotel bar room and found Reese in there, and walked ut into the street with him (Reese); he then remarked that e had not seen me on McIntosh street for a good while; itness replied that he had not been there for about 10 onths; Reese then said that he did not go there as frequent s he used to do—that Keener had taken his woman from im; and he said that Keener was a damned coward, and hat he had made him leave there two or three times, and hat if ever Keener crossed his path he would kill him; he hen said he was going out before long and kick up hell out here; this was either the Thursday or Friday night before is death; we then turned and walked down the street, and here was no more said about it.

The last ground of motion for new trial was supported by he following affidavits:

STATE OF GEORGIA, RICHMOND COUNTY:

In the Superior Court of said County.

Personally appeared in open Court, William Cauley, who being sworn, says that on the twenty-third day of January, 1855, James Sikes, who was afterwards sworn in chief as a juror to try the case of The State *vs.* Henry C. Keener, in a conversation with deponent, referring to said case, made use of the expression, that said "Keener ought to have his neck broke." And deponent further says, that said conversation

took place in the Jury-room in the City Hall, in said county, when the Jury was considering the case of John P. King *vs.* Jones & Cumming.

his
WILLIAM X CAULEY.
mark.

Sworn to and subscribed in open Court, this 30th day of January, 1855.

OSWELL E. CASHIN, Clerk.

STATE OF GEORGIA, RICHMOND COUNTY:

Personally appeared, Thomas W. Miller and John K. Jackson, who being sworn, say that they were Counsel for the prisoner in the foregoing case, and that the facts stated in the foregoing affidavit were not known to them, or either of them, until after the verdict was rendered, and that they do not believe that they were known to their associate Counsel, A. H. Stephens, Esq.

T. W. MILLER,
JOHN K. JACKSON.

Sworn to 31st January, 1855.

W. MILO OLIN, J. P.

STATE OF GEORGIA, RICHMOND COUNTY:

Before me appeared Henry C. Keener, the defendant, who being sworn, says that he did not know the facts set forth in the above affidavit of William Cauley, until after the verdict was rendered.

HENRY C. KEENER.

Sworn to and subscribed before me, the 31st Jan. 1855.

G. F. PARISH, J. I. C.

Upon the hearing, the State produced the following affidavits:

STATE OF GEORGIA, RICHMOND COUNTY:

Personally appeared, James Sikes, who being sworn, says

that he has no recollection of ever having made use of the expression to William Cauley, "that Keener ought to have his neck broke;" that he has no recollection of having made use of said language, either in the Jury room, while on the trial of the case of John P. King *vs.* Jones & Cumming, or elsewhere. Deponent thinks that if he had made use of any such expression, he would now remember it. Deponent further swears, that he was a stranger, both to the deceased and the prisoner, in said case, and that he had no prejudice against the said Keener; but that he stood indifferent between the State of Georgia and Henry C. Keener, the prisoner.

JAMES SIKES.

Sworn to and subscribed before me, this 18th day of February, 1855.

HEZ'TT WILLIAMS, J. P.

STATE OF GEORGIA, RICHMOND COUNTY:

Personally appeared, Hugh O'Neill, who being duly sworn, says that he was one of the Jurors in the above stated cause; that the conduct of James Sikes, while serving with him on said Jury, was decorous and proper; that he manifested no prejudice against the defendant; that the Jurors, generally, had determined upon their verdict when they went to the Jury-room, and that Sikes neither attempted to exert, nor really did exert, any influence in the finding of their verdict.

HUGH O'NEILL.

Sworn to and subscribed before me, this 19th day of February, 1855.

JOHN H. SPENCER, J. P.

Two other Jurors made similar affidavits.

Upon the hearing, prisoner's Counsel produced the following additional affidavit:

STATE OF GEORGIA, RICHMOND COUNTY:

Personally appeared, Isaiah R. Butler, who being sworn, says that he was raised with James Sikes, and has known

him from early boyhood; that said Sikes has always been reputed to be a man of weak and unsound mind, and been known among his neighbors and acquaintances; that some time during the week in which the case of the State *vs.* Henry C. Keener was tried, and before said Sikes was sworn to try said case, at Augustine Frederick's, in the City of Augusta, he, deponent, heard said Sikes say that he had been summoned as a Juror, and that if he was sworn on the case against Keener he would be damned if he would not cross his neck. Deponent further says he afterwards heard said Sikes, at the Court House in said City, repeat the same language, in substance.

ISAIAH R. BUTLER.

Sworn to and subscribed this 20th February, 1855.

DANIEL S. BUSH, J. P.

Whereupon, the Attorney General asked for further time to procure additional affidavits in support of the Juror, and time was allowed by the Court.

On Friday, the 23d of February, 1855, the Attorney General offered the following affidavits:

STATE OF GEORGIA, RICHMOND COUNTY:

Personally appeared in open Court, James Sikes, who being duly sworn, saith that he was a Juror on the case of the State *vs.* Henry C. Keener, in the Superior Court of said County; that he has seen the affidavit of Isaiah Butler, stating certain remarks as made about said Keener by this deponent; and deponent denies having made the remarks therein stated, or any such remarks, to said Butler, or in his presence, or to any other person. Deponent is certain that if he had used such language, he would not have forgotten it. In fact, he saith that he had no such feeling or bias towards Keener to cause such language; that he has known said Butler for a long while, and affirms, to the best of his recollection, that during the sitting of the present term of this Court, he never saw said Butler at all, saving once, and that was on or about

Tuesday of the first week; while passing out of the Court House, some one, whom deponent took to be Butler, bowed to him and he returned it; more than that, not a word passed between them; and if they had been in Fredrick's, as stated in Butler's affidavit, deponent is satisfied, under the circumstances, that he would remember it; moreover, deponent, before coming to Court, does not remember whether he ever heard any particular mention of the homicide of Reese by Keener; certainly was entirely free from any bias or prejudice against Keener; nor ever expressed any opinion about the defendant, previous to the trial.

JAMES SIKES.

Sworn in open Court, February 23d, 1855.
O. E. Cashin, Clerk.

State of Georgia, Richmond County:

Personally appeared, James A. Templeton, who, being duly sworn, saith that he knew James Sikes, Juror in the case of the State *vs.* Henry C. Keener, and has lived in his neighborhood, and in fact in half a mile of said Juror, for about twenty-two years; that he is a man of ordinary mind, neither very extraordinary nor weak; that he is one of the best of blacksmiths in deponent's part of the country; that he is considered by deponent and by the neighbors, a sober, industrious and saving man; that he owns a place, where he lives, which was purchased by his industry; that as to character for truth and veracity, deponent knows no cause, personally or from information, why he should not be fully credited, and that under oath, he would put the same faith in him as in other men; that deponent is of the opinion that the said Sike's memory is not defective, but very good. The family of said James Sikes is respectable.

JAMES A. TEMPLETON.

Sworn to and subscribed, this 22d, Feb. 1855.
Wm. T. Gould, Judge C. C. Pleas,
City of Augusta.

STATE OF GEORGIA, RICHMOND COUNTY:

Personally appeared before me, John T. Palmer, a citizen of Burke County, who being duly sworn, saith that he is a practising physician, and acquainted with James Sikes, Juror, (as informed,) in the trial of Wm. C. Keener, for murder in first aforesaid county, and has been for about twenty or more years; that in his opinion said Sikes is a man of about ordinary mind, no indication of weakness or any extraordinary strength; that in fact, deponent hath known said James pretty much all his (deponent's life; that said James is a man who will run on and jest, but under oath, deponent hath no reason to distrust him, and would rely upon his statements thereunder made.

JOHN T. PALMER.

Sworn to before me this 21st day of February, 1855.

JOHN H. SPENCER, J. P.

The reception of the last two affidavits was objected to by prisoner's Counsel. The objection was over-ruled, and prisoner's Counsel excepted.

Upon the reception of the affidavits of Palmer and Templeton, prisoner's Counsel asked for additional time to furnish affidavits in support of Butler's, in relation to the unsoundness of the mind of the Juror, Sikes, stating that they had just come to the knowledge that said Sikes had been removed from a trustship in this Court on that account, and that the fact could be shown. The Court refused to allow time, and thereupon prisoner's Counsel excepted.

On the 24th day of February, 1855, the Court proceeded to pronounce its decision upon said motion for a new trial. The motion was over-ruled and a new trial refused. Whereupon, prisoner's Counsel excepted.

Upon these several exceptions error has been assigned.

T. W. MILLER; A. H. STEPHENS, for plaintiffs.

Attorney General SHEWMAKE, for the State.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] We propose to consider the grounds of error complained of in this case, in the order in which they are presented in the assignment; and the first is, that the Court did not set aside Samuel A. Verdery, but allowed the Attorney General to put him upon the prisoner as a competent Juror.

When the name of Samuel A. Verdery was called, he was put upon his *voire dire;* and in answer to the question—"Have you, from having seen the crime committed, or having heard any portion of the evidence delivered on oath, formed and expressed any opinion as to the guilt or innocence of the prisoner at the bar?" Said Juror announced that he had not, but that he had formed and expressed an opinion from what he had heard of the case. He answered the other questions propounded by the Statute negatively. The Attorney General pronounced the Juror competent, and he was *accepted* and sworn in chief to try the cause.

Whether Mr. Verdery was a competent Juror, we are not called upon to decide. True, he was pronounced qualified by the State's Attorney, but not by the presiding Judge. His opinion, as to whether or not the Juror stood indifferent, was not invoked; and yet, it was the only judgment which this Court is authorized to review. There has been no decision by the Court below upon this point. Not only was no attempt made by the prisoner to get rid of the Juror, by making the question to the Judge, but he failed to put him upon triers, to test his competency, as he was entitled to do under the Act of 1843. He *accepted* the Juror as he was—and consented, without objection, that he should be sworn in chief, to try the traverse. And it is a maxim of the English Law, as well as of common sense, that no one can take advantage of a wrong which he, himself, agreed to.

This doctrine underwent a thorough investigation by the Judges in Convention in *Glover vs. Woolsey, & Co.* (*Dudley's R.* 85.) It is true, that was an action of *assumpsit;* but the

reasoning of the Convention, as well as the authorities cited, apply to criminal as well as civil causes. It is there laid down as a well settled rule, that an omission to challenge a Juror before trial, is a waiver of the objection to him; and that it would be most unreasonable to allow a party the benefit of a verdict, if favorable to him, and the benefit of a new trial on account of the objection, if the verdict should be adverse. In one of the cases referred to, *Jeffries et al. vs. Randall*, (14 *Mass. R.* 206,) the Court say, "Had the demandants made the requisite Statutory inquiry, *and failed of discovering the fact which would have disqualified the Juror*, it would have been equitable to have granted relief at this stage of the proceeding; but having omitted to avail themselves of their rights when the Jury was empannelled, the motion cannot now obtain."

And so we say in this case.

[2.] In the progress of the cause, the Attorney General offered as an original witness, on the part of the State, one Wm. A. Archer, whose name was not on the list of witnesses sworn before the Grand Jury, nor among those of whom the defendant had notice. Counsel for prisoner objected to said Archer's being sworn as an original witness on the part of the State, for those reasons. The Court over-ruled the objection, and Counsel for the prisoner excepted.

It is insisted that Archer was incompetent to testify, and the 7th section of the 14th division of the Penal Code is relied upon for his exclusion. It is in these words: "Every person charged with a crime or offence which may subject him or her, on conviction, to death or imprisonment in the Penitentiary for the term of three years or more, shall be furnished, previous to his or her arraignment, with a copy of the indictment, and a list of the witnesses who gave testimony *before the Grand Jury*." (*Cobb's Digest*, 834.)

In the case of *Stokes against The State*, recently determined at Milledgeville, this Court held, that the defendant was entitled only to a list of the witnesses who gave testimony before the Grand Jury. Such is the definite language

the Code; and if ever the maxim, that the express mention of one thing implies the exclusion of another, is to have practical application, no case can occur more palpable than is.

True, a different construction was put upon this clause by e late THOMAS N. P. CHARLTON, Judge of the Eastern Cir-it, in *The State vs. Calvin and others*, (*R. M. Charlton's* 142.). And the reason assigned was, that as one of the thors of the Penal Code, he was solicitous to place rsons accused under our law, upon as high a scale of dig-ty as was dictated by the wide difference between a citi-n of a Republic and the subject of a Monarchy. Hence, ery person committing a *felony* in this State, should be aced upon the same footing as a subject of England charged th *treason*. And that as by the Statute of *Ann*, a prisoner arged with *treason*, was entitled to a list of *all* the witness-to be produced, with their professions and places of abode, e like provision was incorporated with our Code, the better enable defendants, by inquiry into the characters of the thesses, to make their defence.

However much we may admire the humanity of the motive hich prompted this interpretation, we most respectfully sub-it, that both the distinguished Jurists who framed the Code, well as the Legislature which adopted it, were most impor-inate in the use of the terms employed, if the exposition of dge CHARLTON be correct. And we coincide with His onor, Judge HOLT, that it is not safe to inquire what the amer of the law thought when he drafted it, but what the egislature intended when they passed it; and that this in-ntion is to be gathered from the words used, taken in their lain and obvious sense; and that it is very clear, that all at was designed was, to let the accused distinctly know, efore arraignment, the charge brought against him—the rosecutor who preferred it, and the witnesses who gave tes-mony before the Grand Jury. This is all that is expressed. Had it been designed to limit the State, on the trial, to any

particular set of witnesses, some words of restriction would have been used. Here there are no such words. The Statute of Anne contains the words, "a list of witnesses to be *produced*." Ours, "a list of the witnesses who gave testimony before the *Grand Jury*." How widely different the phraseology! And yet, they are treated, in the decision to which we have referred, as not only the same in reason and principle, but one is considered but the re-enactment of the other.

We affirm the judgment of the Circuit Court upon this point also.

[3.] As to to third ground: A witness, Goodwyn, introduced by the State, on cross-examination, was asked "whether the tone of voice, with the language and manner of the deceased at the time he walked through the piazza to the room in which the defendant was, was not such as to cause him to expect or look for a difficulty?" This question was not allowed to be put, but the witness was permitted to testify what the tone of voice, language and manner of Reese, at the time, were, which he did.

We regret that this question was not suffered to be propounded, because of its entire immateriality. Every body, at the house where this homicide was committed, that night, expected a difficulty, as a matter of course. There could have been but one answer to the interrogatory, and that would not have weighed a feather with the Jury; and yet, hours, perhaps, have been consumed, first and last, in discussing the rule of evidence applicable to the facts contained in the record. We subjoin the reasons given by the Judge for rejecting this testimony, in his own language:

"This question was not allowed to be asked, because the answer would not be as to a fact, but the expectation of a witness, arising out of a series of facts, either then in evidence or capable of being put in evidence. Now the expectation of the witness was nothing more than the deduction or conclusion of the mind of the witness, as to the effect which these facts produced on his mind, and inferentially, would be likely to produce on the mind of Keener."

"It is not for a witness to draw such conclusions; that belongs to the Jury. This is the general rule of law—to which, however, there are exceptions: as in questions of sanity or insanity, art or science, and others of a like nature, in which the *opinion* of a witness, founded upon facts too multitudinous and minute to be presented to the mind of Jurors, or of a skill, the witness' own, is admitted. There is another class of exceptions, founded chiefly on defect of memory, in which the witness may give his belief: such as questions of personal identity, handwriting, &c. and others, in which he may state his *impressions* or *understanding*. Such were the cases of *Moody and Wife vs. Davis*, (10 *Geo. R.*) and *Fielder and others against Collier*, (13 *Ga. R.*) But the Court does not find the case before it to be within any of the exceptions. The question asked the witness was, as to what he expected from the conduct of Reese—which conduct was intended to be proved by the impression it made on his mind; or, as expressed by one of the Counsel, a daguerreotype likeness of his conduct, as reflected from the mind of the witness, was wanted. It was certainly important to ascertain what was the conduct of Reese on that occasion, even to the minutest action. But the mirror from which it was sought to have it reflected, may not have been true. There may have been the seams of credulousness, timorousness, passion or prejudice to disturb the likeness; and which may have been very different from that which would have been made on the mind of the Jury by a simple statement of facts."

Our brother, we believe, has stated, with accuracy, the rule as laid down in the books. (1 *Greenlf. Ev.* §440.) And yet, the writer from which it is taken, cites with approbation the case of *McKee vs. Nelson*, (4 *Cowen*, 355,) in which it was held, that in an action for breach of a promise to marry, a person accustomed to observe the mutual deportment of the parties may give in evidence *his opinion* upon the question, whether they were attached to each other; and that, too, without it being made to appear that the witness was an *expert* in the affairs of the heart.

The Court admit the general rule as stated by Judge HOLT, namely: that witnesses are not allowed to give their opinions to a Jury, but suggest, that there are a thousand nameless things, indicating the existence and degree of the tender passion, which language cannot specify, and which cannot be detailed to a Jury. Why, we would ask, may not the various facts which manifest the existence of *attachment*, be as capable of specification as any other matter whatever? Why may not the existence of *love*; as well as *revenge*, being both of them elementary principles of human nature, be proven by external signs and the multiplied exhibitions of its energy? There is no radical difference; and the rules of evidence should be the same, as applicable to both of these master passions. If it be allowable to ask, as in the case of *McKee and Nelson*, whether, in the opinion of the witness, the parties were not attached to each other, it would seem to justify the inquiry, whether the circumstances which surrounded the accused, were not sufficient to excite the fears of a reasonable man? The defendant, however, is required to act upon his own judgment, and not that of another, and is responsible to the law for the soundness of his conclusion. And foreseeing, as we do, the indefinite multiplication of collateral issues to which any other doctrine would lead, we affirm the judgment of the Court below upon this ground.

[4.] The place where Reese was killed, was a brothel of notoriety in the city, and Counsel for prisoner proposed asking the witness, Prater, "whether he was acquainted with the general character of deceased for violence in the place where the difficulty occurred?" And, "what was the character of deceased for violence in that particular place?" Objection was made to each of these questions by Counsel for the State, and the Court refused to allow them to be asked. To which ruling the prisoner, by his Counsel, excepted. And this constitutes the *fourth* error assigned.

No authority was read, for or against this point, except the case of *Boswell and Blackwell*, (12 *Ga. R.*) and that establishes this principle only: that where a witness is sought to

be impeached, and is shown to have a general reputation for truth and veracity in the *county* of his residence, that that may be considered the *neighborhood* in which he lives, for the purpose of satisfying the demands of the law.

I took occasion, when delivering the opinion in this case, to state, that for myself, I was inclined to hold that the rejection of the questions, in the form in which they were put, was error; but that in deference to the opinion of my brother STARNES, as well as to that of the learned Judge who presided at the trial, I was content to affirm the judgment, with this distinct explanation: that it was competent to give proof as to the general conduct of the deceased for violence at this place—especially toward Keener—the testimony showing that they had long been rivals for the favor of the keeper of the brothel.

Upon examination, I am satisfied that the questions propounded to Prater, were in the proper form.

Mr. *Greenleaf*, in treating of the rule as to the admissibility of evidence of general character, concludes thus: "But it seems that the character of the party, in regard to any particular trait, is not in issue, *unless it be the trait charged against him;* and of this, it is only evidence of *general reputation* which is to be admitted, and not positive evidence of general bad *conduct*. And the author quotes *Swift's Evidence*, and numerous cases, English and American, to sustain this proposition. (1 *Greenleaf's Evidence*, §55—*note*.) The particular trait involved in the issue here, was the character of Mr. Reese for violence in this place; a circumstance relied on by Keener, in part, for his justification in committing the homicide. And it would seem that the character of the deceased for violence, was to be established by general reputation, rather than positive evidence of general bad conduct.

Either mode of proof will be satisfactory to the defendant's Counsel, in the present case, provided we repudiate the doctrine, as we distinctly do, that a man may not have different general characters, adapted to different circumstances and localities; that is, a character for rail cars and a character for the brothel; a character for the church and one for the

street; a character when drunk, and a character when sober. Instead of a doctrine like this being too loose for judicial investigation, we hold that it is in accordance with the soundest elementary principles. In *all cases* where evidence is admitted, touching the general character of the party, it ought, manifestly, say the authorities, to bear reference to the nature of the charge against him.

A schoolmaster is indicted for an assault and battery upon one of his pupils; he defends himself under his acknowledged right to inflict moderate correction. The charge puts in issue the character of the teacher for violence; and where, pray, would you go, to ascertain that character? among his fellow-men, or in the schoolroom? There can be but one response to this question: an officer in the army or navy is tried for cruelty to a soldier or sailor; what has his reputation in the community, generally, to do with the trait of character involved in the issue? It is in the barracks, and on board the Man of War, that we look for what we wish to learn. There are thousands of men in this country, mild as a May-morning when sober, but dæmoniacs when drunk; have not such two distinct characters? Their moral identity is completely lost—their individuality metamorphosed under the maddening effects of alcohol. Philip drunk and Philip sober, were altogether different persons. As a conductor, Mr. Reese was uniformly gentlemanly; at the brothel, he was menacing, turbulent, rash, reckless and raging.

The case of *Quesenbury vs. The State*, (3 *Stewart & Porter*, 308,) although not strictly applicable to the precise point which we have been considering is, nevertheless, so pertinent to the case, that I am induced to make the following quotation from the opening of the Court, as delivered of Chief Justice *Lipscombe:* "that the good or bad character of the deceased, as an abstract proposition, can have no influence on the guilt of the accused, is too clear to admit of controversy. To murder the vilest and most profligate of the human race, is as much a crime as if he had been the best, most virtuous, and the greatest benefactor of mankind;

but there can be no doubt but that when the killing has been under such circumstances as to create a doubt as to the character of the offence committed, that the general character of the accused, may, sometimes, afford a clue by which the devious ways by which human action is influenced, may be threaded and the truth obtained. It is an acknowledged principle, that if, at the time the deadly blow was inflicted, the person who so inflicts has well-founded reasons to believe himself in imminent peril, without having, by his fault, produced the exigency, that such killing will not be murder."

"If the deceased was known to be quick and deadly in his revenge of imagined insults; that he was ready to raise a deadly weapon on every slight provocation; or in the language of the Counsel, his "garments were stained with many murders," *when the slayer had been menaced* by *such* an *one*, he would find some excuse in one of the strongest impulses of our nature, in anticipating the purposes of his antagonist; the language of the law in such a case would be, obey that impulse to self-preservation, even at the hazard of the life of your adversary."

"If the killing took place under circumstances that could afford the slayer no reasonable grounds to believe himself in peril, he could derive no advantage from the general character of the deceased for turbulence and revenge; but if the circumstances of the killing were such as to leave *any doubt*, whether he had not been more actuated by the principle of self-preservation than that of malice, it would be proper to admit *any testimony* calculated to illustrate to the Jury the motive of which he had been actuated."

"To this cause, we can see no good objection; and it seems pretty certain, that it would often shelter the innocent from the influence of that sound, but not unfrequently severe maxim of law, that when the killing has been proven, malice will be presumed, unless explained and rebutted. There can be but little danger of the guilty escaping, under the influence of a prejudice created by such testimony against the deceased. The discretion of the Judge will be able to control and pre-

vent such a result. And Jurors will be able to comprehend the reason and object of such proof."

[5.] The next error complained of is, that the Court withdrew and excluded from the Jury all the testimony of James Cosby. This witness testified, that on Friday night before the death of Reese, which was on the Sunday evening he met Reese at the United States Hotel, who remarked to witness, that he had not seen him on McIntosh street for a good while. Cosby replied, that he had not been there for about ten months. Reese then said, that he, himself, did not go there as frequently as he used to do; that Keener had taken his woman from him; and he said that Keener was a damned coward, and that he had made him leave there two or three times; and that if Keener crossed his path he would kill him. He added, he was going out there before long, and would kick up hell. Nothing more was said.

The testimony of Cosby was rejected, mainly upon the ground, that the threats which it proves, were made in a private conversation between Reese and witness, which was never communicated to Keener.

Without stopping to inquire whether the facts related by the witness, apart from the threats, were not admissible, we prefer to confront the question directly; and to consider whether or not the evidence of Cosby, taken as a whole, should not have been received? Keener is indicted for killing Reese; his defence is, that Reese manifestly intended, by surprise or violence, to take his life, or do him some bodily hurt; that the circumstances were such as to excite the fears of a reasonable man; and that he acted under the influence of those fears, and not in the spirit of revenge. The proof is, that two nights before the tragedy occurred, Reese entertained the most deadly hostility toward Keener. Jealousy, another name for insanity, of the most malignant character, had taken possession of his bosom, and was shaking the throne of his reason to its very foundation. *Keener had taken his woman from him;* and if the damned coward ever crossed his path, he would kill him; he was going out on McIntosh street be-

ore long, and would kick up hell there. Prophetic words! He sowed to the wind, and reaped the whirlwind. What a orrible lesson! Well might the wise man say of the house f the strange woman—"*the dead are there!*"

Ought not this conversation, whether communicated to Keener or not, to have been admitted as a substantive fact, o show the *malus animus*, or evil intent toward Keener, with hich Reese went to that house that night? Laying aside all echnical rules and reasoning, we ask, with the knowledge of he mind and feelings of the deceased disclosed by this witness, would we not, and ought not the Jury, to listen more indulgently to the alleged apprehension of injury on the part of Keener? as well as to the facts and circumstances upon which he relies, to justify his conduct? Do not these previous threats throw light upon Reese's conduct, up to the time of the killing? Do they not serve to illustrate the transaction?

It is stated by Mr. *Starkie*, (1 *Treatise on Ev. p.* 39,) *Mr. Roscoe*, (*Ev. p.* 74, *& Seq.*) and all the writers on evidence, that the general rule is, that *all* the circumstances of a transaction may be submitted to the Jury, provided they afford any fair presumption or inference as to the matter in issue. This proposition is exceedingly broad, and if carried out in good faith, would produce the most beneficial results. Accordingly, in *Richardson vs. Royalton & Woodstock Turnpike Co.* (6 *Vermt.* 496,) and *Davis vs. Calvert*, (5 *Gill. & Johnston*, 269,) it was held, that all facts upon which any reasonable presumption or inference can be founded, as to the truth or falsity of the issue, are admissible in evidence.

In addition to the precedents quoted by Mr. *Roscoe*, to sustain the general rule of evidence above stated, we beg leave to refer to a few cases in illustration of the rule.

The case from Vermont was this: An action was brought by the plaintiff for damages occasioned on account of the insufficiency of defendant's bridge—so that in passing with a drove of cattle, some eighteen or twenty were precipitated

into the river, and seven of these were so much bruised and wounded as to make it necessary to kill them. It was shown that the reach of the bridge which fell in had been erected about three years before the accident happened. The plaintiffs further offered to prove, that in 1831, the defendants built the two northern reaches of the said bridge anew, as the old ones had stood about nine years; and that the new reaches thus erected, were stronger than the reach which fell in with the cattle. To the admission of this evidence, the Counsel of defendants objected. But the objection was over-ruled and the evidence admitted, as having a tendency to show that the defendants considered that the augmentation of business, and the necessities of the community, required a stronger bridge than the one first erected. The Court admit that the testimony is not very important, but that in modern practice, the evidence that is admitted to go to the Jury is more natural, and not governed by rules so artificial as formerly. "Under the rule, then," says the Judge, referring to that taken from *Starkie*, "did the evidence afford any reasonable inference, that the southern reach of the bridge, which broke, was insufficient, because in 1831 the defendants built the two northern reaches stronger than the reach that did break? Does it tend to confirm the plaintiff's testimony, or weaken or contradict the defendants?"

In *Caldwell against The State of Connecticut*, (17 *Conn. R.* 467,) it was decided, that where an information for keeping a house of ill-fame, charged the offence as having been committed *after* the Statute prohibiting it, went into operation, and evidence was offered to prove that the house was reputed to be of ill-fame *previous* to that time, that such evidence was admissible as conducing to prove that it sustained the same reputation afterwards.

The State vs. Goodrich, (19 *Vermt. R.* (4 *Washburn*,) 116,) is almost identical with the case under discussion. Goodrich was indicted for discharging a gun at one Green and wounding him; and the person injured was a witness on the trial; and it appeared that the affray took place on the premises of

the defendant. Goodrich insisted that the assault and battery, if committed by him, was in defence of his person or property, and offered evidence to prove that there had, at previous times, been fights between Green and himself; and that his house had been attacked, and his property, by a company, of which Green was one; and that Green had frequently threatened violence upon his person. The Court decided that it was not competent, as a defence to this prosecution, to inquire into the previous affrays and contentions between the parties; or to prove a previous threat by Green, that he wanted to get some powder for the purpose of blowing up the house of the defendant.

Redfield, Justice, in delivering the opinion of the Supreme Court, stated the question to be, whether Green made the first assault, or whether Goodrich acted in self-defence. And after stating that it is not always easy to determine what is collateral to the main issue, the Judge proceeds—"In the present case, if it was material to know with what *intent* Green went to defendant's house, that could only be shown by his acts and his declarations, in connection with those acts. As part of that *intent*, it might have been shown that he declared his intention to see if the hay remained; and we apprehend what is stated in the bill of exceptions, in regard to the tendency of the testimony on the part of the State, to show that he went there *with that intent*, must have been derived, partly at least, from his declarations on the way and while there. That is the only way it could be shown, aside from his own testimony. And we think that all his declarations, from the time of setting out on his expedition, in connection with his acts, are competent to show *with what intent he went there.* And if an innocent intent may be shown in this way, then the contrary may also be shown in the same manner. And in this view, the evidence was in no sense collateral."

"If Green, then, denied making such a declaration, it might be shown that he, in fact, did both as tending to impeach the witness by contradicting him; *and as going to establish the fact that he went there for the purpose of begin-*

ning an affray, and as tending to justify, perhaps, more vigorous defence of any supposed offensive movement on the part of Green."

[6.] The true distinction, we apprehend, as to the admissibility of evidence of threats, and one apparently overlooked in many of the cases, is this: when sought to be introduced by the defendant as a justification for the homicide, and without any overt act, he must show that they have been communicated; otherwise they can furnish no excuse for his conduct; but when offered to prove a substantive fact, namely: the state of feeling entertained by deceased toward the accused, it is competent testimony, whether a knowledge of the threats be brought home to the defendant or not.

[7.] I will merely add, that the remoteness or nearness of time, as to threats and declarations, pointing to the act subsequently committed, makes no difference as to the competency of the testimony. (3 *Strobhart's L. R.* 517, *note.*)

Upon the authority of the note, then, as laid down by Mr. Starkie and others, and as illustrated by numerous adjudicated cases, we are clear that the testimony of Cosby should have been admitted, as it conduced to prove, in connection with other evidence, the *quo animo* with which Reese resorted to the brothel on McIntosh street that night; and that his manner and conduct corresponded with that purpose, so as to warrant Keener in believing that the same scenes were to be repeated there that night, which had been re-enacted several times before; and that no alternative would be left, but to retreat again as he had done before, twice or three times, or take the consequences.

In view then, of the frequent failure of justice, from the failure of evidence—and thoroughly convinced, as we are, that no competent means of ascertaining the truth ought to be neglected, we think the testimony of James Cosby was improperly ruled out. It was pertinent to the issue, and ought to have been submitted to the Jury. It showed the intent with which Reese resorted to this brothel; and, also, his feelings toward the defendant.

[8.] We propose to consider and dispose of the 6th, 7th, 8th and 9th assignments of error together. They present, for our review, the main questions in this case; all the rest are comparatively of minor importance.

In his charge to the Jury, the Court, in the language of the bill of exceptions: "failed, omitted and declined, although requested by the Counsel for the prisoner so to do, to read to the Jury or comment upon the 12th and 13th sections of the 4th division of the Penal Code, upon which Counsel for prisoner had mainly relied for his defence. The Court having read the 1st, 2d, 3d, 4th, 6th and 7th sections, then charged the Jury that the section of the Penal Code, applicable to the grounds on which the defence had been placed, was as follows: reading the 15th section; to which failure, omission and refusal to charge, and charge as given, Counsel for prisoner excepted."

"The Court was also requested, by Counsel for prisoner, to charge the Jury as follows:

1st. That if they believed, from the evidence, that the prisoner, at the time of the commission of the act, was under the fears of a reasonable man, that the deceased was manifestly intending to commit a personal injury upon him—amounting to felony, the killing was justifiable homicide.

2dly. That if they believed, from the evidence, that the prisoner was under similar fears of some act of violence and injury, less than a felony, his offence was manslaughter, and not murder."

"Which charge, so requested, the Court failed and refused to give; to which failure and refusal, Counsel for the prisoner excepted." It is also assigned as error, that the Court failed and omitted to read to the Jury and comment upon the 8th, 10th and 11th, as well as the 12th and 13th sections of the 4th division of the Penal Code, although requested by Counsel so to do.

I would remark, that by reference to the bill of exceptions, I do not find that any request was made of the Court to give a charge and expound to the Jury the 9th, 10th and 11th

sections of the 4th division of the Code. These three sections relate exclusively to involuntary manslaughter; and there is not a particle of proof to make this killing that offence. It was murder, voluntary manslaughter or justifiable homicide. The Court was right, therefore, in pretermitting that portion of the Code which defines, with its sub-division, involuntary manslaughter, and annexes a penalty to each grade of the offence. Counsel for prisoner do not pretend that this law is applicable to his case. To give it in charge to the Jury, then, would be to distract and burden their minds, unnecessarily and improperly. Whether or not there was error in the remainder of these assignments, depends upon the fact of whether there was *any evidence* upon which the Jury might have mitigated the offence from murder to a lower grade of homicide. We go one step further: If the circstances of the killing were such as to leave any doubt whether Keener had not been actuated by the principle of self-preservation, rather than that of malice, we shall be constrained to remand this cause for a new trial. For the question, whether Keener killed Reese to prevent Reese from killing or doing him some great bodily harm, has not, in the opinion of this Court, been fully submitted to the Jury. A part of the law only, applicable to the defence, was given; and where a man's life is at stake, it is fit and proper to allow him the benefit of every provision of the Code.

[9.] In every charge of crime, there must be a question of law, and a question of fact. Is there any such rule of law as that on which the indictment is founded? Has the defendant violated that rule? The decision of both of these is necessarily involved in the general verdict of "guilty" or "not guilty"—the only form of verdict allowed by our Code. The former finding affirms both the existence of the law and its violation by the accused; the latter, either that there is no such law, or that it has not been transgressed. It is the duty of the Judge to declare to the Jury what the law is, with its exceptions and qualifications; and then to state hypothetically, that if certain facts, which constitute the offence, are

proved to their satisfaction, they will find the defendant guilty; otherwise, they will acquit him.

In this State—in all free governments—in tenderness to the accused, great latitude has been allowed to Counsel in stating and enforcing their views of the law in criminal cases. And a liberal confidence has been reposed in those who are called to defend the liberty and life of the citizen in the hour of trial. And where Counsel, in their place, under their professional obligations to the Court and the country, insist that certain portions of the law apply to the facts of their client's case; especially where it is *capital*, it would be better to read the law to the Jury, with such comments and explanations as the Court, possessing the superintending power, might feel it to be its duty to give.

The theory of our system is, that the Jury have not only the power, but the right, to pass upon the law, as well as the facts, in rendering their verdict; and yet, this anomaly stares us in the face, that they are not permitted even to take the Code to their consultation room. They know nothing of the law, except so much and such parts of it as are given them in charge by the Court. This fact alone, is strongly suggestive of the propriety of withholding no law from them, which they are entitled to consider. Suppose, as in the present case, it were doubtful whether this offence, as proven by the witnesses, came under the 12th and 13th sections of the 4th division of the Penal Code, as contended for by the defendant's Counsel, or under the 15th section, according to the opinion of the presiding Judge, should not both have been submitted?

In *Case's English Liberties*; *or*, *The Freeborn Subject's Inheritance*, 201–'2, it is said, "the office and power of Juries in criminal cases, is judicial; from their verdict there lies no appeal; by finding guilty or not guilty, they do complicately resolve both law and fact." And that in a criminal trial, the Jury may determine the law and the fact of the case, has been supported by every English Judge, except Chief Justice *Jeffries*, in the case of *Col. Sidney*, (3 *Har-*

grave's State Trials, 805.) And to their credit be it spoken that the Juries have always been right on fundamental questions of liberty and popular right. (1 *Chandler's Crim. Trials*, 143, 149, 153, 269, 288. *Yenger's Case*, 17 *Howell's State Trials*, 675, 724.)

But how can they judge of law which is not before them? There is no alternative—either the Courts must refer to the Jury the whole law of the case, or the supposed distinction between the power of Juries in civil and criminal cases, should be abolished.

[10.] With these preliminary remarks, we proceed to examine the 12th, 13th and 15th sections of the 4th division of the Penal Code.

By the 12th section, it is enacted, that "there being no rational distinction between excusable and justifiable homicide, it shall no longer exist. Justifiable homicide is the killing of a human being by commandment of the law, in execution of public justice; by permission of the law, in advancement of public justice; in self-defence, or in defence of habitation, property or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony on either; or against any persons who manifestly intend and endeavor, in a riotous or tumultuous manner, to enter the habitation of another, for the purpose of assaulting or offering personal violence to any person dwelling or being therein." (*Cobb's Digest*, 784.)

Section 13th, declares that a bare fear of any of those offences, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing; it must appear that the circumstances were sufficient to excite the fears of a reasonable man; and that the party killing really acted under the influence of those fears, and not in the spirit of revenge." (*Ib.*)

Section 15th, provides that, "if a person kill another in his defence, it must appear that the danger was so urgent and pressing, at the time of the killing, that, in order to save his own life, the killing of the other was absolutely necessary;

and it must appear, also, that the person killed was the assailant, or that the slayer had really and in good faith, endeavored to decline any further struggle before the mortal blow was given." (*Ib. p.* 785.)

It is clear that there is no conflict between these different sections. The last two sections may be construed, perhaps, to be qualifications of the first. The right of self-defence is given by the 12th section, against one who manifestly intends to commit a felony, by violence or surprise, on the person or property of another. Section 13th limits this right, by requiring that the circumstances, to justify the killing, must be sufficient to excite the fears of a reasonable man; and that the party killing, really acted under the influence of these fears, and not in the spirit of revenge; and the 15th section still further restricts the right, by providing that the danger should be so urgent and pressing, at the time of the killing, that in order to save his own life the killing of the other was absolutely necessary.

Either this is the true exposition of the three sections taken together, and they should not, therefore, be separated; or else the 15th section applies to a different class of cases than the one contemplated in the 12th; and we are not prepared to say that the latter would not be the sounder interpretation.

Was there any evidence, then, which entitled the defendant to have the 12th and 13th sections given in charge by the Court to the Jury?

It is in proof, that Reese went to the house of Yarborough, the night on which he was killed, with his bosom boiling with hate toward Keener, and breathing forth threats of revenge, should he encounter him: He finds him in the bed-room of the miserable mistress of the brothel; he kicked furiously at the door; he jobbed at the window with his knife, the blade of which was six inches long; he called out to Jane Yarborough: "show up your Keener, I want to cut his damned throat." Keener dresses and comes out upon the piazza,

armed with a cane and pistol; Reese walked out on the pi— —
azza and asked for a pistol; he then seated himself on the —e
bench with folded arms. Reese called Keener "a damned— ,
cowardly, pusillanimous son of a bitch;" Keener asked him—
to repeat it; he did so; daring Keener to point his pistol at—
him, making, at the same time, a motion with his arm; Keener—
fired and Reese fell; he was shot in the abdomen; and from—
the direction of the balls, Reese must have been in a rising—
attitude or sitting and bending over, when the wound was re—
ceived.

We ask not whether this proof is sufficient to justify Keener—
in killing Reese, or even to reduce the homicide to manslaugh-
ter. That is not the question. Is there *no evidence* which
tends to show that Reese intended, by surprise or violence, to
commit a felony upon the person of Keener? or, at any rate,
that the circumstances were sufficient to excite the fears of a
reasonable man, that such was the intention of Reese?

Without expressing or intimating the slightest opinion as
to the sufficiency of the testimony, we are unanimously of the
opinion that the facts which have been detailed, in connectio
with others in the record, were such as to have entitled t
accused to the consideration, by the Jury, of the law up
which he rested his defence; and consequently, that it
error in the Court to refuse to give this law in charge to
Jury, when requested to do so by prisoner's Counsel.

The presiding Judge instructed the Jury, very pro
to inquire whether the homicide was murder, voluntary
slaughter, or done in self-defence; and read to the Ju
law defining each; and assigned, as a reason, the fa
closed by Emma Burns and Dr. Felder. Why was
the law respecting voluntary manslaughter and j
homicide given in charge? How could it be said t
was evidence to authorize the reading of the 15th s
none which was applicable to the 12th and 13th
and that, too, when it is admitted that stronger p
cessary to acquit under the 15th, than under th
—ions? If the evidence referred to b

tended to establish the defence of the prisoner, under the 15th section—(and if it did not, why was it read?)—why did it not likewise *tend* to the same purpose, under the 12th and 13th sections? The Jury who were sworn to try this traverse, had a right to find their verdict upon their own convictions and consciences: for as was very pertinently said by Chief Justice *Vaughn* in *Bushell's case*, (*Vaughn's R.* 148,) "A man cannot see by another's eye, nor hear by another's ear. No more can a man conclude or infer the thing to be resolved by another's understanding or reasoning." He continues—"Upon all general issues, as upon not culpable pleaded, the Jury find upon the issue to be tried, wherein they resolve both law and fact complicately, and not the fact itself; so as though they answer not simply to the question—what is the law? Yet, they determine the law in all matters where issue is joined and tried." (*Ib.* 150.)

Said Chief Justice *Parsons*, in *Coffin vs. Coffin*, (4 *Mass. R.* 25,) "the issue involves both law and fact; and the Jury must decide the law and fact. To enable them to settle the fact, they must weigh the testimony; that they may truly decide the law, they are entitled to the assistance of the Judge." How to the "assistance?" By withholding from them the law upon which the prisoner professedly grounds his defence? No—nor by having it read, and then taking the law, implicitly and without questioning, from the Court; otherwise, the verdict is not *theirs*, but in part only; and general verdicts should be abrogated, and special verdicts revived. They should find the *naked* fact instead of the *criminal* fact. It follows, demonstrably, then, under our Code, that to make a *whole* verdict—a *legal* verdict, the Jury must find the conclusion of *law* upon the *facts;* and notwithstanding it is their privilege, as well as their duty, to receive "assistance" from the Court, still, the conclusion of *law* upon the facts, must be the result of their own conviction and understanding.

If the power thus committed to the Jury be exercised against the opinion of the Court to convict, the remedy is

with the Court to set aside the verdict and award a new trial. If used to acquit, it must be an extreme case; and although contrary to law, is rarely tainted with corruption. It is produced, generally, by a liberal interpretation of the law, in favor of liberty and life.

In connection with the topics already discussed, the Court was requested, by Counsel for the prisoner, to charge the Jury—

1st. That if they believed, from the evidence, that prisoner, at the time of the commission of the act, was under the fears of a reasonable man, that the deceased was manifestly intending to commit a personal injury upon him, amounting to felony, the killing was justifiable homicide.

This charge the Court refused to give. And wherefore? Is it not in exact accordance with the terms of the Code?

2dly. That if they believed, from the evidence, that prisoner was under similar fears of some act of violence and injury, less than a felony, his offence was manslaughter.

This request was likewise refused; and although not in the Code, in so many words, it would seem to be a necessary corollary from the sections we have been considering. Indeed, it is a familiar principle, and one scattered everywhere in works on criminal pleading. "Neither can a man," says *Hawkins*, "justify the killing another in defence of his house or goods, or even of his person, from a bare private trespass; and therefore, he that kills another who, claiming a title to his house, attempts to enter it by force or shoots at it, or that breaks open his windows in order to arrest him, or persists in breaking his hedges after he is forbidden, is guilty of *manslaughter*." (1 *Hawkins' Pleas of the Crown*, 372.)

The requests being legal and refused, the judgment complained of upon these points, must be reversed.

The 7th ground taken in the motion for a new trial, was because James Sikes, one of the Jurors sworn in chief, did not stand indifferent between the State and the prisoner, said Juror having, previously to being sworn, expressed decided opinions in relation to the guilt of the accused, and such strong

prejudice against the accused, as rendered him an incompetent Juror, in law, and which were unknown to the accused or his Counsel, until after the verdict was rendered, said Sikes having previously answered, negatively, the usual questions on the *voire dire*.

As this question cannot recur on the re-hearing of this cause, and no principle is involved in its adjudication, we forbear to consider it; our decision upon the whole case being, that the judgment of the Superior Court ought to be set aside and a new trial granted, which is ordered accordingly.

No. 21.—JOHN B. COURSEY, plaintiff in error, *vs.* DAVID L. CURTIS, defendant in error.

[1.] A promissory note is personal property, within the terms and meaning of the Act of 1821, providing a summary remedy to quiet and protect the possession of personal property.

Case in Richmond Superior Court. Tried before Judge HOLT, January Term, 1855.

This was an action for malicious arrest and false imprisonment. The whole case turned upon the question, whether or not the Act of 1821, in reference to the possession of personal property, authorized the issuance of a possessory warrant, on the ground of the possession of a promissory note claimed by the applicant. The Court below held that the warrant was properly sued out, and the Act applied to such a case. This decision is assigned as error.

J. C. & G. A. SNEED, for plaintiff in error.

There being no appearance for defendant in error, the case was heard *ex parte*.

By the Court.—STARNES, J. delivering the opinion.

The only question in this case is, whether or not a promissory note is personal property, within the meaning of our Statute of 1821, providing a summary remedy for the purpose of quieting and protecting the possession of personal property.

For the plaintiff in error, it was insisted that a promissory note was not such property as the Act contemplated, because it was *a chose in action.* And it was argued that the Statute contemplated personal property *in possession*—that sort of property of which the holder had the *immediate enjoyment and use;* that a promissory note, as a chose in action, was of no value; that it was a mere evidence of debt—the debt being the thing of value, not the note; and that an action might be maintained for the debt, without the note.

It is not accurate to say that a promissory note is not property of use and value to the owner, *as an evidence of debt.* It is of use *as a writing on paper, which, whilst in his possession, will save him the trouble and expense of otherwise proving his debt.* In this point of view, the paper is not personal property in action. It is the holder's right to receive the debt or damage for the breach of the contract which is in action, not the written evidence of such right—that is property in possession; and as such, is of use, as are title deeds, records, &c. Thus it is that *trover* may be brought for promissory notes, for title deeds, certificates of stock, books of records, &c. (*Goggesby vs. Cuthbert*, 2 *N. Rep.* 170. 5 *Bos. & P.* 170. *Yea vs. Field*, 2 *T. R.* 1708. *King vs. Milsom*, 2 *Camp.* 5. *Towle vs. Lovett*, 6 *Mass. R.* 394. *Todd vs. Crookshanks*, 2 *John.* 432.)

In this sense, certainly, a promissory note must be held to be embraced in the terms of the Act of 1821.

It has occurred to us, that if the value of this promissory note be determined alone by the value of the paper as a written evidence of debt, and this were looked to as the measure

of the bond which the Act requires to be given, this might afford a very unsatisfactory result. But this is a difficulty of detail rather than of principle. And we are not called on to make any decision upon the point.

Judgment affirmed.

No. 22.—JOHN MILLER, plaintiff in error, *vs.* JAMES M. REINHART, defendant in error.

[1.] A certificate of naturalization was to this effect: I, J F G, Clerk, &c. certify, that at a Superior Court held at Savannah, J M R, an alien, &c. petitioned the Court to be admitted a citizen and, having in all things complied with the law in such case made and provided, the said J M R was accordingly admitted a citizen of the U. S. having first taken and subscribed, in open Court, the oath of naturalization: *Held*, that this certificate was not sufficient to show J M R naturalized.

Appeal from Ordinary, in Montgomery Superior Court. Tried before Judge HOLT, April Term, 1855.

James M. Reinhart applied for letters of administration upon the estate of his wife, Cassa Reinhart. John Miller caveated the application. On appeal to the Superior Court, from the decision of the Ordinary, the questions in this case arose.

The applicant offered in evidence the following testimony:

1st. His letters of citizenship, to wit:

STATE OF GEORGIA, CHATHAM COUNTY:

United States of America, in the Superior Court of Chatham County.

To all whom these presents may come, greeting: I, John F. Guilmartin, Clerk of said Court, do hereby certify and

make known, that at a Superior Court held at Savannah, in and for the county aforesaid, before the Honorable William B. Fleming, Esq. Judge of said Court, on the 24th day of January, 1855, James M. Reinhart, an alien and subject of the King of Germany, petitioned the Court to be admitted a citizen, and having in all things complied with the law in such case made and provided, the said James M. Reinhart was accordingly admitted a citizen of the United States of America, having first taken and subscribed, in open Court, the oath of naturalization.

Given under my hand and seal of the said Court, this twenty-fourth day of January, in the year of our Lord, one thousand eight hundred and fifty-five, and in the seventy-ninth year of the Independence of the United States of America.

[L. S.] JNO. F. GUILMARTIN, Clerk S. C. C. C.

To which document or certificate of the Clerk, of the fact of the naturalization of the applicant being admitted in evidence, caveator, by his Counsel, Wm. B. Gaulden and DeLa-Motta Sheftall, objected, on the ground that if said applicant had ever been legally made a citizen and naturalized, the evidence was matter of record; and that the exemplification of that record, at least the judgment of the Court, should have been introduced, and was higher and better evidence than a mere notarial certificate of the Clerk. The Court overruled the objection and admitted the testimony, and Counsel for caveator excepted.

2d. Counsel for applicant then introduced in evidence the original license of marriage between the applicant and his wife, Cassa; proved the marriage by a witness who saw them married; which fact of marriage was admitted, and took place in Laurens County, 6th February, 1853; proved that Cassa, the wife of the applicant, on whose estate he applied for letters of administration, was dead; that she had an only child, who died before she did; that her father died before she did, possessed of a considerable personal and real estate, leaving five children besides the wife of the applicant. It was fur-

her proved by John M. Reinhart, that the applicant was a native of Bavaria, in Germany, but had resided in the State of Georgia for the last 14 or 15 years; and had resided in Laurens County for the last number of years, say 7 years, and was a resident of this State, and Laurens County, at the time of his inter-marriage with Cassa Miller, his wife, and is now. It was further proved, by Malcomb Curry, that the father of intestate was dead, and died intestate before Cassa Reinhart, the wife of applicant, leaving a considerable personal and real state; that Cassa, the wife of applicant, died intestate; that he had no other property of her own, either in possession or expectancy, than that mentioned in a certain deed of conveyance, (which conveyance was afterwards rejected by the Court,) and what might be due her as one of the distributees of her father's estate; that caveator was the brother and and next of kin of deceased. It was proved that Cassa had jewelry and clothes at her death, and her right, whatever it may have been, in her father's estate. It was also proved by Farquhard McRae, Deputy Ordinary of Montgomery County, that letters of administration had been granted to the caveator, John Miller, 6th of February, 1855, on the estate of John Miller, (his father,) but that the inventory and appraisement had not yet been returned. Counsel for applicant here closed.

Counsel for the caveator then opened his case to the Jury, and offered in evidence the original marriage settlement between the applicant and the said Cassa Miller, in the following words, to wit:

STATE OF GEORGIA, MONTGOMERY COUNTY:

This indenture of three parts, made and entered into this February, the fifth day, in the year of our Lord, eighteen hundred and fifty-three, between James M. Reinhart of said State and county of the first part, Cassa Miller of said State and county of the second part, and John Miller of said State and county of the third part, witnesseth, that the said James M. Reinhart of the first part, for and in consideration of mar-

That in all cases, the plaintiff *shall* state, in his notice, that the damages do not exceed *thirty* dollars."

It is self-evident, that thus far the Statute applies exclusively to cases under thirty dollars; and which are to be tried in the Justice's Court. To undertake to show this, by argument, would be as absurd as to attempt to demonstrate an axiom. The very Act requires, in so many plain English words, that in all that class of cases for which it has thus far provided, the notice itself should state that the damages do not exceed thirty dollars.

But it is ingeniously argued, that the notice, in the one case twenty days, (as we shall presently see,) and in the other five days, before Court, is only in the nature of a return day and does not affect the imperative necessity, in both alike, of serving notice within fifteen days after the injury complained of; which means, if we comprehend the position correctly, that the fifteen days' notice is something different from the notice which is the substitute for the petition or summons in ordinary suits. It means this or it means nothing.

But the words of the Act negative this construction. The person aggrieved is to serve the company with a written notice, describing the stock which has been killed or injured, *which notice* shall contain a statement also of the time and place when and where the damage was done—is not this the fifteen days notice?)—and *which notice* may be served personally upon any employee of the company, [illegible] be found, at least three days before the [illegible] leaving it at the employee's residence, [illegible] the [illegible]. And *which notice* (what notice? [illegible] the foundation of the action—[illegible] it [illegible] shall be served within fifteen days [illegible] of the [illegible] and not after. The notice [illegible] forty [illegible] complaint, may be served pers[illegible] fore the trial, or five days previous there[illegible] the defendant's notorious place of resid[illegible] *be done* within fifteen days after the hap[illegible]

The Act contemplates but one notice. A [illegible]

Signed, sealed and delivered in presence of
his
NATHANIEL ⋈ GRAY,
mark
LEWIS BEACHAM, J. P.

CLERK'S OFFICE, Montgomery County.

The within agreement or contract, recorded in book P P, on folios 80 and 81, this November, 23d day, 1854.

A. T. McLEOD, C. S. C.

To the admission of which in evidence, the Counsel for applicant objected, upon the ground that it was irrelevant to the issue, because—

1st. That it was in proof that the said Cassa Reinhart, at the time of her death, had other property in her possession, to wit: her wearing apparel, jewelry, &c. and that she was entitled to her distributive share of her father's, John Miller's, estate.

2d. That by the terms of the marriage settlement, if it be a valid and binding instrument, the *trust* created by it ceased at the death of the said Cassa, and the property vested, and there was no necessity for letters of administration to be granted upon her estate to John Miller, the brother and trustee, to execute and carry out the terms of said marriage settlement.

3d. That if it should be held, that by the terms of said marriage settlement, the *trust* was not executed, but was a continuing and executory *trust*, letters of administration upon said Cassa's estate was not necessary to enable the said trustee to carry out and execute the terms of said *trust*.

4th. That, as between the applicant, the husband, and John Miller, the caveator and brother of said Cassa, there was nothing in the marriage settlement to deprive the husband and applicant of his right to the administration on the estate of his wife, the said Cassa.

5th. That the said marriage settlement embraced only the property mentioned in it, and all such as might have been *given* to the said Cassa, but did not embrace such other property as had descended, or was likely to descend to her, by inheritance, or otherwise than by *gift*.

6th. That said marriage settlement had not been recorded in Laurens County, the county of the residence of the husband, the said James M. Reinhart, at the time of his inter-marriage with the said Cassa.

Counsel for caveator, insisting upon his right to have the marriage settlement in evidence, proposed, upon its being received by the Court, to prove that what might be coming to the said Cassa as distributee of her father's estate, together with what property was mentioned in the deed of settlement, was all the property in the possession or expectancy of said Cassa, and urged the introduction of the marriage settlement in evidence, upon the ground that it, in connection with the testimony proposed, would show that applicant had relinquished all right to his wife's property after death without children, by whatever means it might have been acquired; and that if this was shown, the applicant had no right to the administration, but that caveator had, as the right to the administration, followed the right to the property.

The Court rejected the deed of settlement as irrelevant to this issue, for the reason, that the title to the property mentioned in it, could only be settled in a Court of Law, and whether the applicant had or had not renounced his right to it, it was clear that he had not thereby renounced his wife's inheritance, or what might be coming from her father's estate, by this deed. The Court stated that it was not necessary to decide the other points arising in the case; but if it were, the objection arising out of the interlineations would be referred to the Jury, and the recording of the deed in Montgomery County held to be a void act, it having been proved that the applicant, the husband, resided in Laurens. No other testimony was offered by the caveator, and a verdict was rendered for the applicant, under the directions and rulings of the

Court, granting the administration to him. And Counsel for caveator excepted.

Upon these exceptions error has been assigned.

A. J. MILLER, representing Counsel for plaintiff in error.

G. J. & W. SCHLEY, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] The question is, was the decision admitting the certificate right?

Proceedings of naturalization have to be recorded—"which proceedings shall be recorded by the Clerk of the Court," is the language of the Act of Congress on the subject. (*2 Story's Laws U. S.* 851.)

The certificate does not give the words of any part of the record. The certificate seems to be a statement of what, in the Clerk's opinion, is the legal import or effect of the different particulars of which the record may consist.

For the admission of such a certificate as evidence, the naturalization laws make no provision—none exists by the Common Law. But it was said, that the admission of such a certificate is authorized by an Act of this State—the Act of 1830, to amend an Act to regulate the admission of evidence, &c. That Act declares, that the certificate of any public officer, under his hand and seal of office, if one is attached thereto, in relation to any matter or thing pertaining to their respective offices, or which, by presumption of law, properly pertains thereto, shall be admitted as evidence before any Court of Law or Equity in this State, &c. (*Pr. Dig.* 220.)

The Act of which this is amendatory, is the Act of 1817, "to regulate the admission of evidence," &c. which declares, that the certificate or attestation of any public officer, either of the State or of any county thereof, shall give sufficient validity or authenticity to any copy or transcript of any record,

document or paper of file in the respective offices under their control, to admit the same as evidence, &c. (*Ib.* 215.)

This Act is not repealed by the Act of 1830. That Act, by the title of it, is restricted to the *amending* only of this Act. The Act of 1830, therefore, was intended, it is to be presumed, to reach cases which were not reached by the Act of 1817. And it is easy to conceive that such cases may exist. For example, a record may be consumed by fire. In such a case, the Clerk cannot give a certified copy of the record, but he may give a certificate that no such record remains under his control. And this certificate would, I think, be admissible under the Act of 1830. So, a list of names officially filed in a public office, may not have on it a particular name. In such a case, the officer presiding over that office, cannot give a certified copy of that name, but he may give a certificate that no such name appears on the list. And this I think he is authorized to do by the Act of 1830.

Perhaps, too, the Act of 1830 was intended to dispense with the necessity that a transcript of the *whole* of any record or other writing must be produced, before any part can become admissible, and to confer the privilege of using a certified copy of only a part of a record or other writing.

But whatever the intention of the Act of 1830 may have been, we think that the intention was not, in the case of Clerks, to authorize them to give a statement, in brief, of what, in their opinion, may be the legal import or effect of the particulars of the record. We think that when there is a record and a judgment, the certificate, even under the Act of 1830, ought to give a *copy* of at least the judgment, or of some one or more of the other parts of which the record may consist.

And therefore, we are obliged to consider this certificate insufficient, and the decision admitting it as evidence erroneous; for this certificate gives a copy, neither of the judgment nor of any other part of the record.

And this decision is not in conflict with *Campbell vs. Gordon*, (6 *Cranch*, 176,) for in that case the Court had before it

not only the certificate of the Clerk—it had also the *minutes* of the Court.

This certificate being, as we think, not legal evidence, its admission as legal evidence makes it necessary that a new trial should be had. Accordingly, one is granted.

As to the rejection of the marriage settlement, we merely say, that in our opinion, the existence of that settlement ought not to be allowed to deprive the husband of the right of administration. His appointment to such administration cannot, as far as we can see, at all effect any right created by that settlement. If this be so, the settlement, as evidence, was merely irrelevant.

No. 23.—JAMES W. JONES, plaintiff in error, *vs.* The CENTRAL RAIL ROAD & BANKING COMPANY, defendant in error.

[1.] The fifteen days specified in the Act of 1853–'4, defining the liability of rail road companies, &c. within which notice is to be given, or suit brought for the injury complained of, applies exclusively to cases where the demand is under thirty dollars.

[2.] The notice to be given under this Act, must be in the name, and by the authority of the party aggrieved, and a declaration, in the usual form, with process attached by the Clerk, and served by the Sheriff, will not be deemed a sufficient compliance with the Act.

Case, in Burke Superior Court. Decision by Judge HOLT, May term, 1855.

This was an action brought against the Central R. R. & Banking Co., as lessees of the Augusta & Waynesboro' R. R., for the killing of a slave, by the negligent running of their cars. This suit was brought in Burke County, under the Act of 20th Feb. 1844, "To define the liabilities of R. R. Com-

panies," &c. To this suit, a plea was filed to the jurisdiction of the Court, on the ground, that the residence of the corporation was in *Chatham County*. A motion was also made to dismiss the suit, on the ground that the same had not been commenced by plaintiff within *fifteen* days next, after the injury complained of was committed, and because notice was not given, as required by the Act.

The Court sustained the motion, and also the plea to the jurisdiction; and these decisions are assigned as error.

JONES & STURGES; A. H. H. DAWSON, for plaintiff in error.

GRIFFIN & GORDON, for defendant in error.

The Court not being unanimous, delivered opinions *seriatim*.

By the Court.—LUMPKIN, J. delivering opinion.

There are two questions presented for our determination in this bill of exceptions: 1st. Had the Superior Court of Burke County jurisdiction of the case? And, 2d, should the action have been brought within fifteen days, or at any rate, notice of the damage done, given within that time, to some officer, agent or employee of the Company?

We propose to reverse the order of these points, and to consider the last first.

[1.] This proceeding was instituted under the Act of 1853–'4, (*Pamphlet Laws, p.* 93,) and it is necessary to recite a portion of it.

"By the second section, it is enacted that any person whose stock has been or may be killed, wounded or injured, or whose property has been destroyed or damaged (except as before excepted,"—that is, damages for right of way) by the running of any cars, engines, locomotives, or other machinery used by a rail road company, or the officers, agents, engineers or conductors of any such company —— to serve with a written notice, (there is something omitted here,) describing the

kind of stock killed, crippled or injured, and the particular kind of property damaged or destroyed, which notice shall contain a statement of the time and place, as near as can be ascertained, when and where the damage was done, and may be served personally, upon any employee of such company, at any place where such officer or agent, in the employ or service of such Company may be found, at least three days previous to the day of trial, or by leaving a copy of such notice at the residence of such employee, five days previous thereto, and which notice shall be served at any time within fifteen days after the happening of the injury complained of, *and not after*, which service shall be deemed and held as sufficient notice to such company, to authorize the Court to proceed to give judgement, as in cases of debt; that a notice, in *substance* and *form*, as follows, subject to such alterations and additions as the circumstances of the case may require, shall be deemed sufficient;

GEORGIA, COUNTY:

To the Rail Road Company:—Greeting: You are hereby notified that, *within the last fifteen days*, to wit: on the day or night of you damaged the subscriber, by killing or destroying, (as the case may be,) (here mention the particular damage done and the kind or species of property injured or destroyed, belonging to him or her,) by the running of a car, engine or locomotive, or other machinery on your road; and desiring that the amount of damages may be legally assessed, you are hereby required by agent or attorney, or in person, to appear at the Justice's Court ground in the District, G. M. (inserting the number of the District in which the damage was done,) by ten o'clock, A. M. on Thursday next, then and there to show cause, if any exist, why the damage shall not be assessed, according to law.

This day of 18

JOHN DOE.

That in all cases, the plaintiff *shall* state, in his notice, that the damages do not exceed *thirty* dollars."

It is self-evident, that thus far the Statute applies exclusively to cases under thirty dollars; and which are to be tried in the Justice's Court. To undertake to show this, by argument, would be as absurd as to attempt to demonstrate an axiom. The very Act requires, in so many plain English words, that in all that class of cases for which it has thus far provided; the notice itself should state that the damages do not exceed thirty dollars.

But it is ingeniously argued, that the notice, in the one case, twenty days, (as we shall presently see,) and in the other, five days, before Court, is only in the nature of a return day, and does not affect the imperative necessity, in both alike, of serving notice within fifteen days after the injury complained of; which means, if we comprehend the position correctly, that the fifteen days' notice is something different from the notice which is the substitute for the petition or summons in ordinary suits. It means this or it means nothing.

But the words of the Act negative this construction. The person aggrieved is to serve the company with a written notice, describing the stock which has been killed or injured, *which notice* shall contain a statement also of the time and place when and where the damage was done—(is not this the fifteen days notice?)—and *which notice* may be served personally upon any employee of the company, wherever he may be found, at least three days before the day of trial, or by leaving it at the employee's residence, five days previous thereto. And *which notice* (what notice? Manifestly the summons—the foundation of the action—in fact, the action itself,) shall be served within fifteen days after the happening of the injury and not after. The notice or summons, setting forth the complaint, may be served personally three days before the trial, or five days previous thereto, by leaving it at the defendant's notorious place of residence. But it *must be done* within fifteen days after the happening of the injury.

The Act contemplates but one notice. And hence, the in-

terpretation sought to be given to it by Counsel for the plaintiff in error, is inadmissable.

There are good reasons for requiring suits under thirty dollars, to be brought at an early day after the injury or cause of action accrues; but the duty does not devolve upon this Court to justify the legislation of the State. We submit to it respectfully, as every good citizen should do to the laws of his country.

By the VIth section of the Act, it is further provided, "That nothing therein contained shall prevent a rail road company, or the agent, or the employee of such company, who may be served with a notice of damage done, from tendering to the owner of such property damaged or destroyed, a reasonable amount as a compensation for the damage so done, which, if accepted by the party aggrieved, shall stop all further proceedings; but the injured party may or may not accept the sum tendered; and if he refuse and proceed to investigate the matter under the provisions of this Act, and shall fail to recover a larger amount than the sum so tendered, he shall pay all costs; and the rail road company shall be discharged from further liability, by paying the damages assessed; *and in all cases when an injured party shall claim damages exceeding thirty dollars, suit shall be brought in the Superior or Inferior Court, by written notice served upon the nearest agent or officer of said rail road company, or by leaving a copy at their place of doing business, twenty days before Court.*"

We have endeavored to show that the fifteen days spoken of in the previous section of the Act, is restricted exclusively to demands under thirty dollars. We shall now offer some additional reasons why it does not apply to claims exceeding thirty dollars. And it is enough to say, that the Statute does not make it so. There is no limitation to actions, except that which the law prescribes. *Williams vs. Jones,* (13 *East.* 449.) Blot out the Statute of Limitations, and suits may be be brought within any time after the injury happens, however remote.

It was a maxim of the Common Law, that "an action never dies." And Lord *Ellenborough* said, that there was an unlimited right of suit until restrained by the Statute of Limitations. Even the doctrine that presumes a bond satisfied after the lapse of twenty years, was no part of the ancient law, but was introduced by Lord *Hale*, who did not go upon the bench until 1653. (*Oswald vs. Leigh*, (1 *S. R.* 271.) Mr. *Wilkinson* supposes, in his *Treatise on the Limitation of Actions*, *p.* 1, 7, (and in his speculations he seems to be sustained by the authority of Lord Chief Baron *Gilbert*,) that some practical restraint was put upon State claims, before the Statute of Limitations, 21 *James I.* 1623, was enacted. The weight of authority is the other way.

As to demands under thirty dollars, this Act has fixed fifteen days as the definite bounds within which the notice, *which is the suit*, shall be served; whereas, under the 6th section, for claims exceeding thirty dollars, the only requisite is, that the notice *or suit* shall be served twenty days *before Court*; that is, the term of the Inferior or Superior Court to which it is returnable. And this may be done at any time within which ordinary suits for similar injuries or causes of action may be instituted. The *remedy* only is changed by the late Statute. Either this is the limit to be applied by the Courts or none exists.

Had the Legislature intended the fifteen days' limit to have been applied to demands over thirty dollars also, after requiring the notice to be served twenty days before Court, they should have added, as they had done in the other class of cases, "provided the said notice is served within fifteen days after the happening of the injury complained of, and not after." For we take the rule of law to be clear, that while some out of certain requisites are expressly named, the inference is strong, that those omitted are intended to be excluded. In Justice's Court cases, the time of serving the notice, with the limitation of fifteen days, are specified. Here the time of serving the notice is expressed, but the limitation

is omitted. The inference is irresistible, it was intended to be excluded.

[2.] As to the matter of jurisdiction, one of two propositions must be maintained—either that the Act transfers the jurisdiction generally, over the class of cases embraced in it, allowing the party injured to pursue whatever mode of redress he may conceive to be applicable to his case—either that given by the Statute or by ordinary suit at Common Law; or else, it prescribes a form of remedy which must be substantially, if not literally, followed.

We are clear that the proceedings in this case, in order to transfer the jurisdiction from Chatham County to Burke, should be made to conform to the Act creating a remedy contrary to the Common Law. And the only inquiry is, has such *notice* been served in this case as is contemplated by the Act? Does this procedure conform, essentially, to that which the law prescribes? This is neither more nor less than an action on the *case*, to recover damages for a negro slave, the property of the plaintiff, killed on the night of the 22d of July, 1854, by the running of the defendant's cars upon the Augusta & Waynesboro' Rail Road. The petition plainly, fully and distinctly sets forth the cause of action. The declaration is signed by Jones & Sturges, plaintiff's Attorneys. The usual process is attached, but without the name of the Clerk in the copy. We will presume that it has been omitted through oversight, and that it appears in the original. It was duly served by the Sheriff. Is this a good notice, under the Act? We think not.

The tribunal created by the first part of the Act of 1853–'4, was new; it had no existence before. Justice's Courts existed, but they had no jurisdiction over cases sounding in damages. No procedure was provided for this new class of cases; hence, the necessity for the minute specifications as to the mode of conducting the case, from beginning to end, from the service of the notice to the sale by the Sheriff or Constable. Not so with cases falling under the 6th section. The only direction is, that suit is to be brought by serving notice

twenty days before Court. It is silent, in all respects, except as to the mode of bringing and serving the suit. And here, the express mention of one thing implies the exclusion of all others. It must be by *notice*. But how by notice? We answer, in form and substance, the notice prescribed in the previous part of the Act.

It has been rather reproachfully remarked, that the interests of plaintiffs seem chiefly to have been considered by the Legislature in passing this Act. And this we have no doubt is true. The Legislature concluded, that inasmuch as the land along the line of this road had been seized and appropriated for its construction, willingly or unwillingly, it was but reasonable and right that the company should litigate with the proprietors for injuries done at the places where they happened, and where the company had a local habitation and a name, rather than compel the parties aggrieved to follow this "invisible, intangible body"—this "abstract, metaphysical being"—this "ideal essence or entity"—to their principal place of doing business: and hence, they provided the simple and cheap remedy prescribed in this Act.

One element of the *notice* required by the Act, we hold to be essential—indispensable—*it must be in the name of the party complaining*—others may serve it—he alone can give it. A notice in the name of any body else, is no notice. "You damaged the subscriber," &c. is the very language of the notice prescribed by the Act. And who is the "subscriber?" The veteran, *John Doe*, (vainly supposed to be killed by the Act of 1847!) *alias dictus* James W. Jones. We ask, has he given this notice, personally or by any agent duly authorized for this purpose?

Mr. Jones, by his Counsel, addressed a petition to the Superior Court of Burke County, setting forth his grievances, to which, we will suppose, that process was attached by Mr. Edward Garlick, D. Clerk, requiring the defendant to be and appear at the next Superior Court of Burke County, to answer the plaintiff in an action on the case, &c. Is Mr. Garlick, the agent of Mr. Jones, to give this notice? It may be

said, that the Clerk is the agent of all plaintiffs, for this purpose. And it is true that he is, in all civil actions, sued out in the usual way, and to which process must be attached by the officer, otherwise they are void. But here is a case, confessedly, not brought under the Judiciary Act, but under a special Statute; and a case, too, dispensing entirely with process which is made out by the plaintiff himself and served upon the defendant, and returned into the Clerk's office, preparatory to a trial.

This process then, is manifestly a nulity; consequently, no notice has been given, and the jurisdiction of the Court necessarily abates.

Cases may occur, where the defect in this mode of proceeding will be apparent. Suppose the injury to have happened in Burke County, where suit must be brought, and the nearest agent or officer of the company, upon whom it must be served, resided in an adjoining county, or his place of doing business is there. How would process be framed by the Clerk to meet the exigencies of this case? It could not be done. And it never was intended by the Act that it should be. Process was dispensed with—the party was to give his own notice, and the Clerk, *as such*, cannot do it for him.

The Honorable William W. HOLT, by whose authority the process, which, together with the writ, is attempted to be converted into Statutory notice, purports to have issued, was not empowered to delegate this duty to the Clerk. His jurisdiction attached only when the notice was returned served. Before that time, neither the Judge nor the Clerk had any more right to intervene in this business, than any other private persons. If they acted, therefore, for Mr. Jones, the letter of Attorney, and not the Judiciary Act, must be produced.

Upon this ground, then, this proceeding must fail, and the suit in the Court below be dismissed. We are prepared to hold corporations to a plenary performance of all their legal obligations, but we will never strain a point for that purpose.

BENNING, J.—concurring. I adopt the above opinion as my own.

STARNES, J. dissenting.

I find myself compelled to differ from the view taken by my brethren of the point made in this case, to the effect, that notice has not been given to the defendant in error, in terms of the Statute. And these are my reasons:

The main design and intention of the Legislature, in the passage of this Act, was to afford convenience of remedy to the citizen whose stock might be injured by a rail road company. This will not be disputed. It plainly proposed to do this in two ways: 1. By bringing jurisdiction over the injury, to the Courts of the county where that injury was committed. 2. By insuring simplicity, and perhaps economy, in the mode of proceeding.

As such a proceeding was not before proper to Justice's Courts, there was propriety in prescribing the details which we find in the 2d section of this Act. And owing to the form of proceeding, method of proof, &c. in these Courts, it was reasonable that the person there availing himself of the Act, should be required to commence his proceeding in fifteen days from the time of the injury, and by such a form of notice as was furnished in that section.

But the results designed could be effected in the Superior and Inferior Courts, by a more general direction; and so, as I believe, the Legislature very properly contented itself in the 6th section, with the general declaration, that "in all cases when an injured party shall claim damages exceeding thirty dollars, suit shall be brought in the Superior or Inferior

ourt by written notice, served upon the nearest agent or ficer, &c;" and left the plaintiff to adopt such a form as lly, plainly and distinctly set forth his cause of complaint, id informed the corporation of the term of Court at which it as required to answer.

In this section no form of notice is prescribed, as in the 2d ection; not even the substantial requisites of such a form re specified. And why should a prescribed form have been xpressed in the one section, and excluded from the other, if he Legislature had not designed to dispense with it in the ater case? It is fair, however, to infer from the whole Act, hat a notice under the 6th section, should have, in substance, ll the requisites of notice elsewhere prescribed in the Act. Hence, when any such notice containing these elementary equisites of time, place and circumstance—in cases where he damage shall exceed thirty dollars, and which are brought n the Superior or Inferior Courts, is served upon the gent or officer of the corporation nearest to the place of injury—in my opinion, suit is properly brought against he corporation. The liberal spirit of the Act, in this espect, will be remarked even in the 2d section, where the orm of notice is made "subject to such alterations and additions as the circumstances of the case may require."

It is true, that the petition in this case may be said to be n the form of *an action on the case.* And the plea of the lefendant was filed upon the supposition, that the proceeding as in the nature of an action on the case at Common Law. But if it be true, that this sixth section of the Statute does ot positively require a given form, why should this constiute an objection, provided that the corporation receive notice f time, place and circumstances, and the tribunal before hich, and the time, when it must appear to answer for the lleged injury, by such proceeding, as effectually as it ould have received it, if the notice had been fashioned on ot contained in the 2d section?

The defendant unquestionably, in this case, has received

such effectual notice. Though the petition may be said to be in the form of an action on the case, yet, at the same time, it plainly, fully and distinctly sets forth the cause of action in accordance with the Judiciary Act of 1799; and so, in unusually plain terms of ordinary signification, it describes the injury, declares the time and place, and by the process, gives notice of the Court at which appearance is required. It in this way combines notice in terms of ordinary and plain signification, with *technical* notice of the injury done; and thus, employs those terms which custom has made familiar to the profession, as most apt and appropriate, plainly, fully and distinctly to set forth a cause of action. Yet, to this the defendant objects—in effect objects, that the notice is too complete!

It is true, as I believe, that the intention of the Legislature was to dispense with process. But for whose benefit? For the advantage of the person injured. In order to remedy the mischief of forcing him to carry his suit against the corporation from his residence and the place of the injury, to the distant county in which the principal place of business of the corporation might happen to be situated; and thus, to save time and expense to him, in his own attendance, and that of his witnesses, on Court, as well as to save costs by simplifying the proceedings. But if the plaintiff, the person injured, for whose benefit this provision was made, choose to dispense with it, and to have process appended and made a part of his notice, does it lie in the mouth of the defendant to object?

As I have said, I do not deem the process necessary, nor formal service of it by the Sheriff, required by the Act. It was obviously the intention of the Legislature to obviate the inconvenience of bringing suit in the usual way, and to accomodate the mode of proceeding to the change as to jurisdiction, which it had made. The nearest agent of the corporation might not reside within the county where the injury was committed. The Act required the suit to be brought in that county. The Sheriff, therefore, would have difficulty in serv-

ing the process in the usual and regular way. Hence, the Act permitted service by notice, in such a case as that before us, and dispensed with the necessity of service by process. But if the plaintiff choose to file his petition with the Clerk of the Court, and authorize him to annex a process, he thus plainly makes that officer (whose peculiar duty it is, in suits before his Court, to give notice of the term and time of the Court's session,) his agent for the purpose of informing the defendant as to the time and place when and where answer is to be made.

For these reasons, I agree with the Counsel who so ably argued this case for the plaintiff in error, in thinking that the method of giving notice which he has adopted, is a substantial and reasonable compliance with the terms of this Statute, and is more in harmony with the forms of proceedings usual in the Superior Court.

It may be said that this Act should be construed strictly. Let this be granted. Still, that strict construction must be a reasonable construction. And according to the view which I take of this Statute, that which I have presented is the only reasonable construction thereof.

No. 24.—EDWARD GIRARDEY and another, plaintiffs in error, *vs.* JNO. DOUGHERTY, defendant in error.

[1.] By the Act of December 6th, 1855, a security upon an administration bond may petition for and have relief from the Ordinary, by counter-security or otherwise, as matter of right. And this Act is not repealed by the Act of December 15th, 1810.

[2.] Such relief cannot extend to the revocation of the administrator's letters, unless under the provisions of the Act of 1810, proof of mismanagement is made; and notice has been given to the administrator in terms of that Act. In this way the two Acts may subsist together.

Motion on appeal, in Superior Court of Richmond County. Decision by Judge HOLT, February Term, 1855.

John Dougherty, the surety on the administration bond of Edwardy Girardey and Wm. J. Dougherty, as administrators of M. Frederick, deceased, filed his petition praying for relief, under the Act of 1805, as *matter of right*, without showing any reason or ground of apprehension. On appeal, Judge HOLT decided that such relief might be granted; and this decision is the error assigned.

G. J. & W. SCHLEY; A. H. H. Dawson, for plaintiffs in error.

A. J. & T. W. MILLER, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

The defendant in error, as security upon the administration bond of the plaintiffs in error, applied to the Ordinary of Richmond County for relief, stating that he conceived himself in danger of suffering loss by reason of his suretyship, and praying for relief.

An appeal, by consent, was taken from the Court of Ordinary to the Superior Court; and that Court decided that the security was entitled to the relief he sought, as matter of right, although the administrators were not mismanaging the estate of their intestate. To this decision exception has been taken.

We have two Acts on this subject: one approved on the 6th day of December, 1805, and the other, on the 15th day of December, 1810. The former provides, that "whenever securities for executors, administrators or guardians conceive themselves in danger of suffering thereby, and petition the Court of Ordinary for relief, the said Court shall cause the executor, administrator or guardian to be summoned to ap-

ear before them at the next sitting thereof, and shall make such order and give such relief in the case, by counter-security or otherwise; as to the said Court shall seem just and equitable." The Act of 1810 declares, that "The said Court shall have power and authority, upon complaint made and cause shown by any security of any administrator or guardian, that his principal is mismanaging his estate, upon which he is the administrator or guardian, to pass an order requiring such administrator or guardian to show cause, if any they have, at the next term, why such security should not be discharged from his suretyship, and such administrator or guardian compelled to give new security, or their administration or guardianship revoked, as to the said Court shall seem expedient," &c. The Act then provides for the making of such new administrator or guardian a party to all suits which may have been brought against the removed trustee.

[1.] The proceeding in this case, confessedly, has been instituted under and by virtue of the provisions in the first of these Acts contained. And the Court below put his decision upon the ground that it was authorized by said Act.

The concluding words of the Act of 1805 do, at first, appear justly to admit of the criticism made upon them by the Counsel for the plaintiff in error, viz: that the language, and "shall give such relief in the case, by counter security or otherwise, *as to the said Court shall seem just and equitable*," was intended to clothe the Court with a discretion by which he could refuse to grant *any order* for relief, unless it seemed to him just and equitable, that an order for relief should be granted. If, however, we reflect a moment, we will see that this language is reconcilable with the intention, to require that relief of some sort should be granted as matter of right; but that this relief should be such only "as to the Court might seem just and equitable." And so far as we are informed, such has been the uniform construction of this Statute.

This construction, perhaps, has been influenced by that which has been given to an older and similar Statute of S. Carolina, as appears from *DeLane's case*, cited in the argu-

ment before us, from 2 *Brev. R.* 167. It is true that there is a slight difference between the two Acts. But it is very slight—not enough to make a difference upon principle. Under these circumstances, we will defer to and adopt a construction of this Act of 1805, which has been so long prevailing in our State.

[2.] But it has been contended, that though this be the correct construction of this Statute, it is, in effect, repealed by the Act of 1810; that this latter Act is repugnant to it; and therefore, repeals it.

When such a point is made, the first duty of a Court is to ascertain whether or not the two Acts are necessarily repugnant—whether or not they can be so construed as to stand together; for "a subsequent Act, which can be reconciled with a former Act, shall not be a repeal of it, though there be negative words." (*Dwarris on S.* 674.) And though "two Acts of Parliament are seemingly repugnant, yet, if there be no clause of *non obstante* in the latter, they shall, if possible, have such construction that the latter may not be a repeal of the former by implication." (*Dyer*, 347. *Dwarr.* 674.)

So, too, it has been held, that "where the provisions of two Statutes are so far inconsistent that both cannot be enforced, the latter must prevail; but if, by any fair course of reasoning, the two can be reconciled, both shall stand." *Ludlow vs. Johnston*, (3 *Hamm.* 553.)

"A repeal, by implication, is not favored; on the contrary, Courts are bound to uphold the prior law, if the two Acts may well subsist together." (*Bomer vs. Lease*, 5 *Hill*, (*N. Y.*) 226. *Bruce vs. Schuyler*, 4 *Gill.* 221.)

Now the terms of the Act of 1805, which we have under consideration, are not precise and definite as to the character and extent of the relief to be granted "by counter-security or otherwise." And we can well see that very grave doubts may have been entertained as to the power of the Court, under this grant, to revoke the letters of administration, if additional security were not given; or, as to the propriety of

doing this, unless there was proof of mal-administration; and thus, embarrassment may have arisen in carrying the provisions of the Act into effect. The Act of 1810 may have been intended to settle this question, and remove this embarrassment, by giving express authority to revoke the letters of administration, if the security were not given. But it was quite right, before the Court was allowed to proceed to this extremity, that it should be required to have proof before it of mismanagement on the part of the administrator. And hence, the provision to this effect, in that Act. Thus, the Act may be considered as repealing so much of the Act of 1805, as might have been construed to have authorized the Court to remove an administrator upon the petition of the security, as matter of right to the latter, and without proof of mismanagement by the trustee, but leaving the other relief which the Act of 1805 contemplates, still to be granted under that Act.

In this way, the two Acts may subsist together. Under the Act of 1805, the security may have relief as matter of right; but that relief may stop short of his removal; or, indeed, of additional security, as the Act authorizes the Court to give relief by counter-security or *otherwise*.

If, however, the security wishes to have the administrator removed, and thus terminate, effectually and forever, the relation between them, he can proceed under the Act of 1810—prove mismanagement and have the administration revoked.

The two Acts thus harmonize, and make useful features of the same system.

Let the judgment be affirmed.

No. 25.—Bryant J. Wasden, plaintiff in error, *vs.* The State of Georgia, defendant in error.

[1.] An indictment for adultery and fornication against a single person, is, under the Code, good.

[2.] The doctrine of the reasonable doubt in criminal cases, extends to cases of every degree.

Indictment, for adultery and fornication, in Jefferson Superior Court. Tried before Judge Holt, June Term, 1855.

Bryant J. Wasden was indicted for the offence of "adultery and fornication." On the trial, a motion was made to quash the indictment, on the ground that this offence could not be charged against one person. The Court refused the motion, and Counsel for prisoner excepted.

After the evidence was closed, the Counsel for defendant requested the Court to charge—1st. That the circumstances of the case should not only be consistent with guilt, but inconsistent with any other rational conclusion. The Court refused so to charge, but instead, charged as follows: "I will not charge you in the words of the request; but do charge, as I have done, that it is not necessary to prove the fact by positive evidence, but the same may be proven by circumstances; that you must be satisfied, to a reasonable certainty, of the defendant's guilt, from those circumstances," and defendant excepted. 2d. The Court was requested to charge, that if the Jury had reasonable doubts as to defendant's guilt, they ought to acquit him. The Court so charged, with this qualification: that in lesser grades of offences, such as misdemeanors, &c. this rule is somewhat relaxed. To this qualification, defendant excepted.

Upon these several exceptions, error has been assigned.

Pottle, for plaintiff in error.

Attorney Gen'l Shewmake, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Can a single person be indicted for adultery and fornication? Section five of the tenth division of the Penal Code is as follows: "Any man and woman who shall live together in a state of adultery or fornication, or of adultery and fornication, or who shall otherwise commit adultery or fornication, or adultery and fornication, shall be severally indicted, and on conviction, such offenders shall be severally fined or imprisoned," &c.

[1.] The *offences* here prohibited are all *joint* offences, each is the offence of a man and woman acting jointly. The remedy here provided, is, however, a *several remedy*—is a separate indictment against each—the man and the woman. Had the remedy been also joint, there would not have been even the appearance of incongruity in the language of the section. But the Legislature had power to prescribe a separate suit for a joint offence. And they have only exercised that power in this section. The indictment, therefore, though against the man alone, was good.

The first request to charge was, in the opinion of this Court, a request to charge what was the law. But the Court, although refusing to give that request in the words of the request, gave in other words, as we think, the substance of it. And there was, in this case, no motion for a new trial. Had there been, this point might, under the New Trial Act of 1854, be material.

The second request was also, as we think, right. We know not of any law which makes the doctrine of the reasonable doubt in criminal cases apply not to "the lesser grades of offences," but only to the greater. The doctrine, as laid down by text writers, on evidence, extends equally to cases of every degree. *Starkie's* language is, "The distinction between full proof and mere preponderance of evidence, is, in its application, very important. In all criminal cases whatsoever, it is

essential to a verdict of condemnation, that the guilt of the accused should be fully proved; neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate full belief of the fact, to the exclusion of all reasonable doubt." (1 *Stark. Ev.* 478.)

This language has been adopted by this Court in *Giles vs. The State of Georgia*, (6 *Ga.* 285.) It has other sanctions. See 3 *Greenleaf's Ev.* §29, *and notes.*

[2.] We think, therefore, that the Court below should have granted this request without a qualification, that excluded from the doctrine of the reasonable doubt the "lesser grades of offences;" and so, that there ought to be a new trial.

The other exceptions were abandoned.

of Respect to the Hon. WALTER T. COLQUITT.

SUPREME COURT OF GEORGIA,
AMERICUS, 10th July, 1855.

norable the Supreme Court met pursuant to adjourn-
esent, their Honors, JOSEPH H. LUMPKIN, EBEN-
NES, and HENRY L. BENNING, Judges.
th of the Honorable WALTER T. COLQUITT, a mem-
Bar, was announced this morning by the Hon. G.
s, who moved the appointment of a committee to
d report resolutions in relation thereto, which was
by Col. Seaborn Jones.
pon, the Court moved as a committee the following
, viz: Hon. G. E. Thomas, Col. Seaborn Jones,
gherty, B. Hill, B. H. Hill, G. M. Dudley and T.
b, Esqs.
nmittee to whom was referred the duty of reporting
rt a suitable preamble and resolution, in commem-
the life and character of the Honorable WALTER T.
whom death has not long since removed from our
pectfully report:
r much beloved and sincerely lamented brother, the
WALTER T. COLQUITT, was one of the peculiar men
. He was strongly and distinctly marked in char-
eminently qualified to leave his *impress* on the the-
. His indomitable will and great moral courage,
on high ground in all great emergencies.
s! "*Death* enters and there is no defence." Nei-
s, nor talents, nor moral worth, nor beauty can es-
nevitable doom. "*Dust* thou art and to *dust* shalt
n." Death is said "to love a shining mark." A
an has fallen! After a severe and protracted con-

flict, which he bore with Christian fortitude and meekness, he yielded up his life to Him who gave, and whose sovereign right it was to take it away.

The event, though not unexpected, was nevertheless painful. Who that knew him, did not love him! who that loved, does not lament his departure! His seat is here become vacant; his voice is here hushed, and that forever. Called away in the noon of his manhood—in the mist of his usefulness. What a chasm is made! not only in the Court, but also in the family circle, and in the public councils.

Of his *social qualities*, how shall we speak? Of a warm and generous disposition, his heart leaped at once into every enterprise of benevolence; his charity embraced all conditions of want and wretchedness.

Of his *intellectual endowments*, we do not exaggerate when we say that he possessed a strong, vigorous, discriminating mind—an intellect which had lightning speed and power. In the Court room or in the Senate Chamber, he was alike the fearless and able advocate, the firm and unyielding patriot. Always the same great *original*, he was, as occasion required, *peculiar*, *striking*, *overwhelming*. His eloquence sometimes resembled "the music," sometimes "the thunder of the spheres."

As a *Jury advocate*, in the defence of life and liberty, he had few equals and no superior. More than all, he was a *Christian*—a sinner saved by grace. And if he ever wandered from the straight and narrow path, (and who has not?) none repented more sincerely, none made restitution sooner than he. *Religion* bore his fainting spirits up when all earthly props gave way. This sustained—this never failed him.

> "Our life's a dream, a morning flower,
> Cut down and withered in an hour."

But this *Amaranthine* flower blooms the brighter as the hand of death approaches, and sheds a sweet perfume around the cold precincts of "the noisome tomb." "The chamber where the good man meets his fate, is privileged beyond the common walks of life, quite in the verge of Heaven." He

died, "being full of the Holy Ghost," and left the world in triumph!

"There is a life above,
And all that life is *love*."

This mournful Providence speaks to us, his surviving brethren, in a language not to be misunderstood, "Be ye also ready." Let not the lesson be lost—but, giving heed, let us *love* and *adore*—knowing that our Heavenly Father does all things for the best.

1. *Resolved*, That while we sincerely sympathize with the *bereaved*, we will cherish in our hearts the memory and the virtues of our deceased Brother.

2. *Resolved*, That as a perpetual record of our love and admiration of him, we respectfully ask of this Honorable Court the privilege of having this preamble and these resolutions spread on the Minutes of this Court.

3. *Resolved*, That a copy of the same be made out and signed by the Clerk or this Court, and be by him forwarded to the family of the deceased. Also, a copy for publication to the papers in Columbus and Macon.

REMARKS OF THE HON. JUDGE LUMPKIN.

Mr. Chairman and gentlemen of the Committee and Bar: The Court cordially responds to the very feeling and eloquent tribute which you have paid to the memory of our deceased brother and friend.

No man that has lived within this State for the last thirty years, has left or will leave a stronger impress upon the public mind than WALTER T. COLQUITT. Who has touched the community at so many points? Who has exhibited the same versatility of talent? Who is a more striking type and exponent of the practical working of republican institutions? Emerging from comparative poverty and obscurity, he stepped at once from the Bar to the Bench, and by the energy of his mind and character, filled, in rapid succession, a seat both in the House of Representatives and Senate of the United States.

As a popular orator and advocate, especially in *criminal* causes, the deceased was unsurpassed by any of his cotemporaries. And whatever may have been the extravagances (if you please) of his style and manner, it rarely failed of success and to elicit the enthusiastic applause of his auditory; and this is the highest compliment that can be paid to a public speaker—albeit, he may violate every rule of rhetoric taught in the schools. His imitations on the Hustings, at the Bar, and even in the Pulpit, are legion.

But I will not dwell at this time on the peculiarities of the deceased. No man had more friends, or friends more devotedly attached to him. And this was natural as well as right, for a more unselfish man, in all the private relations of life and intercourse with society, never lived. We love them who love us, is the law that binds man to man, as well as man to his Maker. It was but a short time before his death that I was conversing with a female member of his family—a lovely woman who preceded him to the grave—and she related how, in a recent travel with her father-in-law, when he could scarcely sit up, he seemed to forget himself entirely and think only of her comfort. Is it strange that such a man should be endeared to his friends?

You have spoken, Mr. Chairman, of the *moral* courage of the deceased. But an equal tower of strength was his *physical* firmness. He never feared the face of man. We have many amongst us who are brave from pride, or principle, or education. His was innate. It was the courage of Nelson, and Ney, and Zachary Taylor—that was wholly unconscious of the presence of danger. I speak what I *know*. Such a man could not fail to be a magnanimous foe.

But our friend and brother, so instinct with life, has passed away in the meridian of his manhood. That pulse that beat so active has ceased to throb; that brain that teemed with ten thousand plans and purposes, will think no more.

If ever man was endowed with antediluvian constitution—born to live a thousand years—Judge COLQUITT was. But he was as prodigal of his health as he was of his purse. He

knew no rest. No sooner did the bugle sound for political or professional warfare, than every nerve was strained to the utmost tension for the fight. He rushed into battle with every power of soul, mind and body, and would take no repose till the conflict was ended.

We saw him at this place after one of the most exhausting efforts ever made, and when his mortal malady, which had fixed its iron grasp upon him several years previously, was preying upon him—borne to the stage coach by his friends—hurry away to a neighboring State to renew his struggles upon another theatre. We cannot but reproach one so munificently endowed by nature, and whose life was so important to his family and country, for thus throwing it away as a useless thing.

Let us take warning by his example, and be not overworked. We press toward the mark for the prize, and perish on Pisgah in view of Canaan and its clusters. He seemed to live but to die. We trust he died but *to live forevermore!*

But I am done. Should my life be spared, and I can steal the time from the severe exactions of my official duties, I will endeavor to erect a more abiding monument and one more worthy of the deceased. With me, it will be a labor of love. We were College mates in a distant State, at a period of life when friendships the most pure and lasting are formed. When I reached Princeton, I found my young countryman in difficulty, and was able, fortunately, to assist him. I found myself in greater trouble afterwards, when he repaid the obligation, with usury.

I can readily forgive and forget an injury—a favor, never. The memory of WALTER T. COLQUITT will be pleasant to me until my own heart, like his, shall cease to beat.

CASES

ARGUED AND DETERMINED

IN THE

'REME COURT OF THE STATE OF GEORGIA.

AT AMERICUS,

JULY TERM, 1855.

Present—JOSEPH H. LUMPKIN, EBENEZER STARNES, HENRY L. BENNING. } *Judges.*

No. 26.—THOMAS D. FRITH, plaintiff in error, *vs.* FRANCIS FRITH, defendant in error.

1.] A husband sues his wife for a divorce, alleging that, at the marriage, she was pregnant, and that he was ignorant of the pregnancy. The wife applies for temporary alimony. The husband resists the application, and offers to prove the truth of his allegation. The Court refuses to receive the proof, and grants the alimony: *Held*, that the Court did right.

Libel for divorce, in Randolph Superior Court. Decision Judge PERKINS, October Term, 1855.

Thomas D. Frith commenced a libel for divorce, on the ound that his wife was pregnant at the time of marriage, d concealed the fact from him. A motion was made for nporary alimony and Attorney's fees, when Counsel for li- lant proposed to prove, by various witnesses, and the con-

fessions of the wife herself, that the ground taken in the lib was true. The Court rejected the evidence and granted te dollars per month as temporary alimony, and one hundre dollars for Attorney's fees. This decision is assigned a error.

The same point was made in other assignments.

H. HOLT, for plaintiff in error.

DOUGLAS, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] Was the husband, under the particular facts of thi case, bound to supply to the wife temporary alimony; and also, a sum sufficient to pay her Attorneys their fees? Thi is the sole question.

It was insisted, for the husband, that as the wife, in th marriage, had practised a fraud upon him, which fraud he wa able to prove by her own confessions, as well as by other ev dence, he was not.

But we do not see that this distinguishes his case from th cases in which the husband has been held to be so bound This, if true, amounts only to the making out of a case, o the part of the husband, which will give him a title to a d vorce. And if, when the husband says he is able to mak out such a case as that, he is to be relieved from alimony, an the expenses of the wife's side of the suit, then the num of cases in which he will not relieve himself from such a mony and expenses, will probably be small.

In *McGee vs. McGee*, (10 *Ga. R.* 478,) a case in whic the husband was the defendent in the libel, the husband a swered, on oath, denying the ground of the libel, and offering as he said he had repeatedly done before, to receive the wif again into his house; yet, he was made to pay alimony. To the same effect are *Methvin vs. Methvin*, (15 *Ga. R.* 98, and *Roseberry vs. Roseberry*, (17 *Ga. R.* 139.)

The rule is thus stated by *Shelford:* "After proof of

marriage in fact, alimony, pending the suit, will be allotted, whether it be commenced *by* or *against* the husband, not only in cases of impotency, but in all cases of nullity of marriage, and in suits for restitution of conjugal rights, or for divorce, by reason of adultery or cruelty." And this statement of the rule seems to be well supported by decided cases. I refer, particularly, to *Portsmouth vs. Portsmouth*, (3 *Ad.* 68,) and *Bird vs. Bird*, (1 *Lee*, 209.)

According to this last case, this Court, in *Roseberry vs. Roseberry*, went too far in permitting the husband to object to the payment of the alimony; that the marriage, though a marriage *de facto*, was not one *de jure*.

We think, therefore, that the Court below was right in refusing to receive the husband's offered proof.

No. 27.—JOHN G. WINTER, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant.

[1-] Where a party or his Counsel are taken by surprise, by a misunderstanding of the Court, it is good ground for setting aside an order or judgment of the Court resulting from such mistake.

Motion, in Muscogee Superior Court. Decision by Judge WORRELL, December Term, 1854.

At June Term, the case of the State *vs.* Winter being called, and there being no appearance, a *rule nisi* was taken to forfeit his recognizance. At December Term, a motion was made to set aside this *rule nisi*, on the following facts: Winter was very ill at the time the case was called, and unable to attend the Court. His Counsel, R. J. Moses, was also absent, the Court having announced, as he understood him,

that Judge Perkins would preside during the week, and no criminal case would be taken up. Mr. Moses had communicated this fact to Winter. Judge Crawford, who was the then presiding Judge, stated that he did announce that he expected Judge Perkins, and in the event of his coming, certain specified cases would be tried, but that his announcement was conditional. Several affidavits were submitted to show that others understood Judge Crawford in the same way with Mr. Moses.

The Court refused to grant the motion, and this decision is assigned as error.

Judge BENNING having been of Counsel, did not preside.

S. JONES and H. HOLT, for plaintiff in error.

DOUGHERTY, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Ought the judgment of forfeiture in this case have been set aside? We think so, most clearly.

That Winter was prevented by Providential cause from attending Court, is not disputed; and the only question is, has he rendered a satisfactory reason for not making his situation known to the Court when his case was called for trial?

He was informed by his Counsel, that the presiding Judge had announced publicly, from the Bench, that no criminal case would be tried that week; and there is a large amount of proof to show that Judge Crawford was so understood by the bar and the by-standers. True, the Judge states that his announcement was conditional, provided Judge Perkins attended according to promise, to preside for him. By this mistake, Mr. Moses, the Attorney of Winter, was absent. Had he been present, he could have made known the situation of Winter, for he was cognizant of it. Owing to the same misapprehension, Winter was lulled into security, and failed to furnish proof of his condition.

And now, that it appears that these facts, or most of them, were brought to the mind of the Court, not only before the judgment of forfeiture was placed upon the minutes, but before, perhaps, the ink was dry in which it was written, (for the showing was made, in part, at least, on the same day that the order of forfeiture was granted,) we entertain no doubt but that the judgment of forfeiture should have been rescinded.

No. 28.—SEABORN JONES, plaintiff in error, *vs.* FRANCIS M. LAWRENCE, defendant in error.

[1.] Our Statutes, authorizing the proceedings for foreclosure of a mortgage, direct that judgment shall be rendered only for "the amount which may be due." Under these Statutes, therefore, a provisional judgment cannot be rendered (when one instalment of a mortgage debt is due and unpaid,) on instalments which are not due; but resort may be had to a Court of Equity for such a judgment.

Rule, in Muscogee Superior Court. Decision by Judge WORRELL, December Term, 1854.

This was a proceeding to foreclose a mortgage given by Lawrence to Jones, to secure the payment of three notes, due respectively 25th day of December, 1853, 1854 and 1855. In the mortgage, was this clause—"It is further understood between the parties, that if said Lawrence shall fail to pay said notes, or any part thereof, that then the said Jones may foreclose this mortgage for the balance that may remain unpaid on said notes." But one of the notes was due when the petition was filed.

The motion was now made (January, 1855,) to foreclose for the whole amount of all the notes. The Court refused the motion, and this decision is assigned as error.

Judge BENNING did not preside in this case.

J. JONES, for plaintiff in error.

There being no appearance for the defendant, the cause proceeded *ex parte*.

By the Court.—STARNES, J. delivering the opinion.

[1.] This was a proceeding instituted under and by virtue of the 17th section of the Judiciary Act of 1799, and the Act of December 26th, 1836, providing for the foreclosure of mortgages on real estate. Those Acts, in authorizing a proceeding for the foreclosure of a mortgage, after providing that upon petition, a *rule nisi* shall be issued requiring the mortgager to pay the principal, interest, &c. due upon such mortgage, into Court, on or before the first day of the next term, direct that unless the same be paid, "the Court shall give judgment for the amount which may be due on such mortgage, and order the property to be sold," &c. These Statutes thus authorize a judgment of foreclosure for the amount *which may be due*, and for this only.

Where a debt is due by instalments, upon default made in the payment of one instalment, the mortgage may be foreclosed by proceedings known to a Court of Chancery, and a provisional decree be rendered suitable to the exigency of the case. The judgment when thus rendered, remains subject to the future order and direction of the Chancellor, and may be put into execution as the successive instalments become due. The right to do this in Equity, is put upon the ground, that a Court of Chancery abhors a multiplication of suits and of costs. It has been held, therefore, that "It is reasonable, since the plaintiff has been put to his suit to recover the instalment due," that he should have "a decree of foreclosure, to remain subject to the order of the Court upon a subsequent

fault." (*Lansing vs. Capron et al.* 1 *John. Ch. R.* 617. *tanhope vs. Manners*, 2 *Eden.* 197. 2 *Vern.* 135.)

By looking to the decided cases, it will be found that such e the grounds upon which rest the elementary dicta, cited r the plaintiff in error, as favoring the motion submitted by m.

It should be at once perceived, that whilst such a provisional decree befits a Court of Chancery, and may be by the me, properly and appropriately rendered, and whilst the me may be consonant with the principles and purposes of stice, and very convenient and desirable in some cases, yet, at inasmuch as our Statutes, in authorizing the proceeding r foreclosure on the Common Law side of the count, have t provided for such a provisional judgment, and have direct- l that judgment shall be rendered only for the "amount hich may be due," no judgment could be properly rendered i the instalments which were not due upon said mortgage.

But it is insisted, that there is a provision in the mortgage hich, in effect, changes the contract; as it appears in the otes, makes all the notes due and payable, as it were, upon le failure of the defendant in error to pay any part of said otes; and judgment may be rendered on the same, as on an nount due.

We think that an examination of this mortgage shows, that ie provision in question, (which is given in the statement of cts, to this opinion annexed,) was intended simply to ex- the usual terms upon which a mortgage may be fore- osed. The language employed is unusual, but it will admit this signification. The mortgage, indeed, as a whole, is t drawn according to precise and usual forms. Waiving is, however, it is not our opinion that this provision could ve been intended to mean, that all the notes should be con- dered as due, upon failure to pay any one of them, and that could mean no more than that the creditor should have the ght to foreclose, for the whole amount of the notes, upon ilure of the debtor to pay any one of them, and that a pro- sional judgment should be rendered accordingly; that is to

say, that it was an agreement reduced to writing, as to the creditor's right to have such a provisional judgment. But, as we have shown, it is the province of a Court of Chancery to grant such a decree, and our legislation has made no provision for it in the proceeding which it authorizes at Common Law. It follows, therefore, that though the meaning of this feature of the mortgage be what is insisted on, the plaintiff must still go into Equity, if he wants a foreclosure for an instalment not due; and there he may use this agreement as evidence of his right to such a decree.

We add, in conclusion, that it is the inclination of our minds, (though this point is not made in the bill of exceptions, and we are not therefore called on for a formal judgment thereupon,) that there is no reason why judgment might not have been properly rendered for the amount of the notes due in January last, when the *rule absolute* was moved, though but one was due at the time the petition was filed. The *rule nisi* had required the mortgager to show cause why he should not pay *the whole* of said notes into Court at the next term, &c. He was thus so notified, that he might have been prepared with a defence, if any he had, against the claim to foreclosure, for the amount of all or any of the notes. If he had any meritorious defence against the second note, therefore, he might have presented it, and have been prepared to sustain it. We, consequently, incline to think, that as the second note was due, it would have been in accordance with the principles of substantial justice, and of the legislation under which the proceedings were instituted, for the Court to have made the rule absolute, as to both the notes due, at the time when the judgment was rendered.

Let that judgment be affirmed.

No. 29.—JOHN JONES *et. al.* plaintiffs in error, *vs.* JOEL CRAWFORD and another, executors, &c. and others, defendants in error.

[b] A writ of error will not lie to a first verdict or decree, where an appeal has been taken which is still pending.

Writ of error from Muscogee. Motion to dismiss.

It appeared that Polly W. Jenkins died testate. Samuel Boykin and Joel Crawford qualified as her executors. John Jones and others filed a bill against the executors, claiming a portion of the estate. The executors filed a bill enjoining the Jones bill, and making the other heirs, the Wrights, parties. Afterwards, the Wrights filed a bill against the executors and the Jones', claiming the same property. The executors afterwards (the Wrights' and Jones' bills being both in the appeal,) filed a supplemental bill, reviving the former, and enjoining both the other bills, and praying for an interpleading. At the last term of Muscogee Superior Court, when the Jones' bill was reached on the appeal docket, the Court decided that, having reached a branch of the case, he could take up the whole litigation, and proceeded to submit *all the three cases* to a Jury. A decree was rendered on the bill of interpleader, filed by the executors of Mrs. Jenkins. From this decree the Jones' appealed; at the same time, they sued out a writ of error as to the decision above stated, and other decisions during the trial. A motion was made to dismiss because of the pendency of the appeal.

Judge BENNING did not preside in this case.

B. HILL and H. HOLT, for the motion.

S. JONES, contra.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] A motion is made to dismiss the writ of error in this case upon two grounds. 1st. Because all the parties to the proceeding in the Court below, are not made parties to the pleadings in this Court; and 2d. Because an appeal has been duly entered from the decree in the Circuit Court, wherein the errors complained of were committed, which appeal is still pending.

The defect, as to parties, might be cured by amendment; the other exception is fatal.

It seems there were three suits pending on the equity side of the Court; two at the instance of the legatees of Mrs. Polly W. Jenkins, deceased, against the executors; and one by the executors against the complainants, in the other two bills. This last was in the nature of a bill of interpleader; it enjoined the other two. When the first legatee bill was reached, that of the Jones' against the executors, and which was on the appeal and enjoined by the executor's bill, the Court permitted and directed the whole litigation to be gone into, and all three of the cases to be tried together as one; and this is alleged as error, as well as the various rulings of the Court, made during the progress of the trial.

And, we think, the more regular course would have been for the case first reached to have been passed over as enjoined, until the bill of interpleader was called up; still, the other method was pursued; a verdict was rendered and a decree awarded upon the whole litigation made by the three bills; and from that verdict and decree, an appeal has been duly entered, which carries up the whole litigation, of course; and inasmuch as the Court will have an opportunity to review and correct its own errors upon the appeal, provided any have been committed, we must, in conformity with the past practice of this Court, dismiss this writ of error, as having been prematurely brought.

30.—WILLIAM D. SHOCKLEY, plaintiff in error, *vs.* CORDY BULLOCH *et al.* defendants in error.

] In a proceeding by attachment, under the Act of December 8th, 1820, n the part of securities upon a promissory note, against the maker thereof, the facts which the Act require to be set forth in the affidavit, in addition to the affiant's liability, and that the principal debtor is removing, bout to remove, or has removed, without the limits of the State, or any ounty, are, an allegation of the securityship upon an instrument in writing, and a payment of the same by the surety, or a pendency of suit thereon, or a liability upon the same, as a demand which is not due.

] The Act does not require the affiant to state that the ordinary process f law cannot be served upon the debtor.

] When our Attachment Laws prescribe a *form* of proceeding, it should be ursued: when no form is prescribed, there should be a substantial compliance with *all* the requirements of the law.

Attachment, in Marion Superior Court. Decision by Judge OBBELL, at March Term, 1855.

Cordy Bulloch and two others, in their affidavit for an attachment, said "that they are the securities of William D. ockley, on a note made payable to P. McLaren & Co. or der, for the sum of Six Hundred and Eight Dollars and ty-one Cents, which said note is to become due on the 2d y of June next, and that said William D. Shockley is about remove without the limits of said State."

The attachment founded on this affidavit, directed the offi- to attach a sufficiency of the property of Shockley to satisfy the demand, and the same "secure, to answer the complaint of P. McLaren & Co."

A motion was made to dismiss the attachment—

1st. Because the affidavit does not set forth the liability of securities on the note.

2d. Because the affidavit does not state that "the ordinary ocess of law could not be served."

3d. Because the attachment was in favor of P. McLaren & when the affidavit was by the sureties.

The Court refused to dismiss, and this decision is assigned as error.

ELAM, for plaintiff in error.

BLANDFORD, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] The ground first assigned by the plaintiff in error, as a reason why the motion to dismiss the attachment in this case should have been sustained, is, that the affidavit did not set forth the facts upon which it was sought to have the same issued, sufficiently, and according to the requirements of law.

A Statute of December 8th, 1820, declares, that in any case where a person has been a security for another on a note obligation, or other instrument of writing, and has been compelled to pay the same; in cases where suit is pending on such an instrument; "in cases where such note, obligation or other instrument, to which there is or are security or securities, is or are not due, and the principal debtor or debtors, in any such case, is or are removing, or is or are about to remove, or have removed without the limits of this State, or any county; and oath being made by the security or securities, his, her or their agent or Attorney, &c. of the facts, and of his, her or their liability on said note, &c. and that his, her or their principal is or are removing, or about to remove, or have removed without the limits of this State, or any county therein, an attachment may issue against the property and effects of such principal debtor or debtors, in favor of such security or securities."

It will be perceived, that in addition to the liability of the affiant, and the allegation that the principal debtor is removing, about to remove, or has removed, this Act requires that *the facts* upon which it is sought to sue out said attachment, shall be set forth in the affidavit. What *facts*? For the answer, we must look to the Act—to the conditions there specified, upon which it authorizes the attachment to issue.

These conditions appear in that portion of the Act which we have cited, and are: 1. The fact of securityship upon a note, obligation or other instrument in writing. 2. A payment of the demand by the surety, or a pendency of suit on the same, or a liability upon such a demand, which is not yet due. These are the other facts, and the only other facts to which the Statute refers as bases or conditions upon which the attachment must rest.

Let us see, then, if they have their place in the affidavit.

In that instrument, the affiants make known that they are securities for the plaintiff in error, upon a note made payable to P. McLaren & Co. or bearer, for the sum of six hundred and eight dollars, and fifty-one cents, which was not then due. This plainly shows the extent and character of their liability; and they further state, that their principal is about to remove without the limits of the State. As we have seen, these are the conditions upon which the Statute authorizes an attachment to issue; and the conclusion is, that the facts are therefore sufficiently set forth.

[2.] It was insisted, in the next place, that the defendants in error should have set forth the fact in their affidavit, that *the ordinary* process of law could not be served upon the principal, because of his being about to remove from the State.

The Statute does not require this; and there was propriety in its not requiring it. What *ordinary* process *of law* was there in such a case, by which securities might proceed against their principal before the debt was due? This language, in the general Attachment Law of the State, was clearly used in reference to the ordinary proceedings by creditors against debtors, on debts due. It seems to be proper, that it should not have been used in such a proceeding as that before us; and it is not required to be used by the Act.

[3.] The third ground was, that the affidavit was made in the names of the securities; but that the attachment writ commanded the officer to seize and secure the property of the de-

fendant to answer the complaint of the principal debtors, or the payees in the note.

The Statute declares and provides, that "in a case where a suit or suits may be pending as aforesaid, or on a demand where the note, obligation or other instrument in writing is not due, such security shall have a lien upon the property and effects of the principal attached, until such property is replevied or the principal debtor or debtors shall give good and sufficient security to the person suing out such attachment, his, her or their agent, &c. for the payment of such note, when it may or shall become due, or at the termination of said suit or suits; and in case the property shall not be replevied, the person attaching shall be permitted to proceed to establish his demand, as though the debt was due or the suit or suits determined; and the property or effects of such debtor, so attached by such security or securities, shall be disposed of in the manner pointed out by the Attachment Laws of this State, and paid into the Clerk's office of the Court in which such attachment may be pending, subject to be paid over, by order of said Court, to the original creditor and creditors, when such debt shall become due."

The attachment writ in this case commanded the Sheriff to seize and secure the property to answer the complaint of P. McLaren & Co. the principal debtors, before the next Superior Court. It will be seen, from the language of the Statute which I have just quoted, that the words, *to answer the complaint of P. McLaren & Co.* though not precisely authorized by the Statute, are simply surplusage. It would have been more technically accurate for the Justice to have directed that the said property should be had before the Superior Court, to answer the demand of the plaintiffs, and to abide any order and direction of the Court in the premises. But the matter of substance in the mandate, was the order to have the same before the Superior Court at the next term. No other and further direction, by the Justice, could control the right of the Court when the same was before it, to dispose thereof according to law. And no such direction could inter-

fere with the rights of the parties. The direction, as it is, therefore, amounts to a substantial compliance with the law.

[3.] It is true, that our Attachment Acts should receive a strict construction. Accordingly, when they prescribe a *form* for proceeding under them, that should be followed; and when no form is specified, there should be a substantial compliance with all the requirements of the law in this regard. No form was prescribed by the Act which we have under consideration, for the writ which the Justice was authorized to issue; and we have shown that it was substantially in compliance with the requirements of the Act; which, therefore, has been pursued with sufficient strictness.

Judgment affirmed.

No. 31.—A. J. PERDUE, by his next friend, &c. plaintiff in error, *vs.* JOHN BRADSHAW, defendant in error.

[1:] 66th Common Law rule, providing that "when a verdict has been obtained at Common Law, and an appeal entered without judgment signed upon the said verdict, judgment shall not afterwards be signed further back than the time of disposing of said appeal," so far modified as to allow a *nunc pro tunc* judgment; but not to prejudice the intermediate rights of third persons.

Motion, in Marion Superior Court. Decided by the Justices of the Inferior Court, called in to preside on account of the interest of the presiding Judge, at February Term, 1855.

A motion was made to enter a judgment *nunc pro tunc*, upon this state of facts. A verdict had been rendered by a Petit Jury and an appeal entered. The motion was made to enter a judgment on the first verdict. The Court refused the motion, under the 66th Common Law rule. The validity and

effect of that rule is the only question made by this writ of error.

Judge BENNING, having been of Counsel, did not preside.

O. W. MILLER; SMITH & POU, for plaintiff in error.

BLANDFORD & CRAWFORD; S. HALL, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The Common Law rule is, that all judgments, whether interlocutory or final, shall be entered of record, of the day of the month and year *when signed;* and shall not have relation to any other day. Still, the discretion is given to the Court or Judge to order a judgment to be entered *nunc pro tunc*. Indeed, it is not only competent to do this, but it seems to be almost a matter of course.

By the 66th Common Law rule of practice, adopted by the Judges of the Superior Courts in this State, it is provided that "in all and every case, when a verdict has been obtained at Common Law and an appeal entered without judgment signed upon the said verdict, judgment shall not afterwards be signed further back than the time of disposing of said appeal." (2 *Kelly*, 479.)

Feeling itself compelled by this rule, the Circuit Court refused permission to sign a *nunc pro tunc* judgment in this case.

This rule of practice was adopted, no doubt, to protect the rights of third persons, which may have accrued between the rendition of the first and the final verdict. But the same object can be secured, without prescribing an arbitrary rule, which seems to trench not only upon the Common Law, but the rights of the parties. True, by his *laches*, the plaintiff is placed in a condition where the Court is entitled to grant him relief upon terms. But the punishment ought to be proportioned to the offence, and should not be vindictive. Acting

upon this principle, our judgment is, that the *nunc pro tunc* order should have been allowed, accompanied, however, with the proviso, that the same should not prejudice third persons who had acquired rights intermediate the first and second verdicts.

No. 32.—DAVIS & MIZZELL, plaintiffs in error, *vs.* JAMES M. STANFORD, defendant in error.

1.] S brought suit against D & M, upon a promissory note, purporting to be signed by them as partners. D filed a plea of *non est factum*. There was a verdict for the plaintiff, from which D alone appealed. Upon the trial of that appeal: *Held*, that S could not use M as a witness, to prove the liability of D, as M was interested in casting on D a portion of the liability which was then sustained alone by himself.

Complaint, in Marion Superior Court. Decision by Judge WORRELL, at February Term, 1855.

James M. Stanford brought suit against Davis & Mizzell, on a note purporting to be signed by them as partners. Davis filed a plea of *non est factum*. On the trial of that issue on the appeal, the first verdict having been against the defendants, and Davis only having appealed, plaintiff offered Mizzell as a witness, to prove the partnership, and his authority to sign the name of Davis to the note. The Court admitted him as a witness, and this decision is assigned as error.

PRYOR & DAVIS, for plaintiffs in error.

CHIVER & CLEMENTS, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] It is very plain that Mizzell is an interested witness in this issue—interested to throw a portion of that liability upon Leonidas O. Davis, which would otherwise have to be responded to, solely by himself. He cannot, therefore, be a witness in the case, without violating a primary rule of evidence.

It is true, that our Act of 1854 allows any party to the record to be subpenaed and sworn by his adversary; and thus, removes all objections growing out of the relation of the witness to the case, as a party, and as between him and the party swearing him—the latter waiving all such objections, by thus summoning his adversary. But the Statute was not intended, otherwise or further to dispense with the rules of evidence. It was not intended, for example, to admit hearsay testimony from the party sworn, nor to allow him to give parol evidence of a written contract or secondary evidence, when better evidence was in the power of the party. In short, it was designed, only that the testimony of such party, thus invoked, should be received, subject to the rules of evidence applicable to all other testimony.

One of these rules is, that a witness shall not be allowed to testify when he is interested in the result; and therefore, the plaintiff cannot be permitted to use Mizzell as a witness, though he be a party to the record, for the purpose of proving a fact which casts on Davis a liability now alone sustained by the witness.

Judgment reversed.

No. 33.—BENJAMIN MANES, plaintiff in error, *vs.* SOLOMON H. KENYON, defendant in error.

[1.] A charge to the Jury was to this effect: that if the defendant made any representations which were untrue, and the plaintiff was induced to purchase by reason of such representations, it was not necessary to be proven that the defendant knew them to be untrue, but that he was responsible for the representations if untrue; whether he knew them to be untrue or not: *Held*, that the charge was erroneous.

Motion, in Talbot Superior Court. Decision by Judge PERKINS, March Term, 1855.

Benjamin Manes sold a negro woman, Mary, to Solomon H. Kenyon, and by his written bill of sale, warranted the negro to be "sound in body and mind, except some deficiency about her feet or ankles." Kenyon brought an action for *deceit* against Manes, for false representations as to the soundness of the negro, alleging, that from some disease of the feet and ankles, she was utterly worthless, which was well known to Manes. On the trial, it appeared that the negro was not present when the sale was made, and that Manes represented the deficiency to be trifling, when it was proven that it rendered the negro almost valueless.

The Court charged the Jury—1st. That the plaintiff had a right to bring this action, notwithstanding the written warranty; and 2d. That if the defendant below made any representations which were untrue, and the plaintiff was induced to purchase by reason of these representations, it was not necessary to be proven that the defendant knew them to be untrue, but that he was responsible for such representations, whether he knew them to be false or not.

A motion was made for a new trial, on the ground of error in these charges.

The motion was refused and error is assigned thereon.

SMITH and POU, for plaintiffs in error.

B. HILL, PERRYMAN, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] In the case of *Chandelor vs. Lapus*, error was "brought in the Exchequer Chamber, because the declaration" contained "not matter sufficient to charge the defendant, viz: *that he warranted it to be a bezoar-stone, or that he knew that it was not a bezoar-stone.*"

"And all the Justices and Barons, (besides Anderson) held, that for this cause it was error." (1. *Smith's Lead. Cases*, 77.)

This decision has been repeatedly affirmed; as far as I know, it has never, in England, been departed from.

See *Smith's* note to *Chandelor vs. Lapus*. Of the cases affirming this decision, the last which I have noticed, is the case of *Ormrod vs. Heeth and others*, in the Exchequer Chamber. (14 *M. & W.* 651.) The head-note of that case is as follows: "where cotton was sold by sample, upon a representation that the bulk corresponded with the sample, but no warranty was taken by the purchaser; and the bulk of the cotton turned out to be of inferior quality, and to have been falsely packed, though not by the seller: *Held*, that an action on the case for a false and fraudulent representation was not maintainable, without showing that such representation was false, to the knowledge of the seller, or that he acted fraudulently, or against good faith, in making it." And the opinion delivered by *Tindal*, C. J. contains this passage: "The rule which is to be derived from all the cases, appears to us to be, that where, upon the sale of goods, the purchaser is satisfied without requiring a warranty, (which is a matter for his own consideration,) he cannot recover upon a mere representation of the quality by the seller, unless he can show that the representation was bottomed on fraud. If, indeed, the representation was false, to the knowledge of the party making it, this would, in general, be conclusive evidence of fraud; but if the representation was honestly made, and believed at the time to be true by the party making it, though

not true in point of fact, we think this does not amount to fraud in law, but that the rule of *caveat emptor* applies, and the representation, itself, does not furnish a ground of action. And although the cases may, in appearance, raise some difference as to the effect of a false assertion or representation of *title* in the seller, it will be found, on examination, that in each of those cases, there was either an assertion of title embodied in the contract or a representation of title, which was false to the knowledge of the seller."

[1.] If these decisions are evidence of what the law is, and we think they are, one of the charges of the Court below was wrong, viz: this, that if the defendant (below) made any representations which were untrue, and the plaintiff (below) was induced to purchase by reason of these representations, it was not necessary to be proven that the defendant knew them to be untrue, but that he was responsible for such representations, whether he knew them to be false or not.

We understand the other charge of the Court to mean no more than this: that because there is a written warranty, it does not necessarily follow that there may not be an action of deceit. The charge is, doubtless, so general that it might mislead; if the Court meant, by it, no more than what would be authorized by *Baglehole vs. Watters*, (6 *Campbell*,) and *Pickering vs. Dawson*, (4 *Taunt.* 785–'6) then we think it was all well enough. And see *Dickson vs. Zizinia* (2 *Eng. Law and Eq.* 314.) A written warranty, is not a protection to the seller against a fraud on his part.

No. 34.—JAMES COX, propounder, &c. plaintiff in error, *vs.* JOSEPH RUTLEDGE and others, defendants in error.

[1.] A will is propounded for probate, discriminating largely in favor of testator's wife, and against his children by a former wife; amongst other grounds of caveat, undue influence by the wife is alleged. A witness testified, at the instance of the caveators, that "bad feeling" had existed between the step-mother and one of the step-children, who was a caveator; the witness was proceeding to explain the origin and extent of the enmity, when he was arrested by the Court, by the request of Counsel for the caveators: *Held*, that the explanation should have been admitted, and that for withholding this testimony, a new trial must be granted under the Act of 1853–4.

Appeal from Ordinary, in Harris Superior Court. Tried before Judge PERKINS, March Term, 1855.

This was an appeal from the judgment of the Ordinary, admitting to probate, the will of James Rutledge. All the questions made are included in the motion for a new trial.

The following are the grounds taken:

1st. That the Court erred in this: that having, on motion of Counsel for caveators, permitted the witness, Thomas Granberry, to state that Mrs. Rutledge said she had unkind feelings on her part, towards a portion of the Rutledges, the caveators; the Court then refused to permit the witness, on motion of Counsel for propounders, to state the reasons which explained the existence of such bad feelings, given in the same statement.

2d. That the Court erred in rejecting all evidence of the existence of unhappy conjugal relations between the deceased, James Rutledge, and his former wife, the mother of the caveators.

3d. That the Court erred, when having, on motion of propounder's Counsel, given the Jury the following charge, viz: "Fraud is not to be presumed by the Jury, but to be proved to their satisfaction, before they can find against the will on that ground." The Court immediately followed up this

charge with the following expression, viz: "I give you this charge, and also charge that fraud may be proved, by the proof of circumstances which indicate fraud, the existence of which is inconsistent, without the existence of fraud."

4th. That the Court erred, when, having on motion of propounder's Counsel, given the Jury the following charge, viz: 'Undue influence is not to be presumed, but must be satisfactorily shown, before the Jury can find against the will on that ground; and that argument, persuasion or fair and flattering speeches to the testator, to induce him to make the will, are not unlawful and constitute, in themselves, no valid objection to the will." The Court immediately followed up this charge with the repetition of the following expression, which had been before given in charge to the Jury, viz: "But you must consider the condition of the testator's mind, and determine whether such arguments, persuasions or flattering speeches, were used in such a way as to amount to moral coercion."

5th. That the Court erred in charging the Jury the following supposed state of facts, viz: "For instance, the persevering importunities of a wife who will take no denial, pressed upon an old, feeble, sick man, on his death bed, with his mind impaired, and body racked with pain, and he, in order to buy his peace, makes his will in her favor, such will would be void for undue influence."

6th. That the Court erred in charging the Jury, that if they believe, from the evidence, that the legatees had received their distributive shares after said will had been proved and admitted to record in common form, then they could not contest the same, until they returned the legacies; but if the will had never been proved and admitted to record in common form, they are not bound so to do before contesting it; remarking also, that there was no evidence before the Jury that said will had been proved in common form.

7th. That said verdict is contrary to law and contrary to evidence.

The motion was over-ruled by the Court; to which decision, Counsel for caveators excepted.

The following was the will:

STATE OF GEORGIA, HARRIS COUNTY:

In the name of God; Amen: I, James Rutledge, of said State and County, being sick; and knowing that it is appointed for man to die, and feeling that my dissolution is near, and being of sound mind and disposing memory, do make and ordain this, my last will and testament, in the following manner, to wit: First, I commend my soul, my immortal part, to God, the author of all good, and recommend my body to be interred according to the custom of family burials. Amen.

Item 1st.—It is my will and desire, that my just debts be paid by my executors, hereinafter named, as early as possible.

Item 2d.—I give and bequeath unto my beloved wife, Emilina Rutledge, two lots of land, one whereon my residence now stands, number not known, and the lot lying due south of it, extending down to Shoal Academy or near thereto, number not known, both lots, together, containing four hundred acres, more or less. Also, one of two wagons, allowing her to make her own selection; one ox-cart, the pleasure carriage and carriage horses, two choice mules, buggy and harness, three sows and pigs, three cows and calves, one yoke of oxen, all my household furniture, (except two beds and furniture,) my kitchen furniture and as many farming tools as she wishes, and the gold watch and chain that she usually wears, and the following named negro slaves, to wit: Sarah and her five children, Jasper, Columbus, Washington, Georgia Ann, Sarah Frances and Daniel, John and Andrew, and also, yellow girl Anna; also corn, meat and fodder sufficient for herself and family for one year's support. I will and bequeath the above specified property to my wife Emilina, absolute, to hold, use, enjoy or dispose of, as she may desire, forever. I also desire, that my wife shall have the gin, fan and running gear to the gin house.

Item 3d.—I will and bequeath to my grand-son and daughter, William and Eugenia Caroline, children of my son, John

Rutledge, two bedsteads, beds, bedding and also five hundred dollars in money.

Item 4th.—I will and desire, that my entire estate, both real and personal, not disposed of by legacy, be sold at public sale, and the proceeds applied as hereinafter directed—said sale to be for a credit of twelve months.

Item 5th.—I give and bequeath to my daughter, Ann Lee, one thousand dollars, to be invested in property for her use during her life, and at her death, to the use of the lawful heirs of her body, under the direction of my executor, hereinafter named.

Item 6th.—I will and desire, that the residue of the proceeds of the sale of my property, after settling and paying my bequests above specified, be equally divided between my sons, John Rutledge, James Rutledge, and my daughter Ann Lee, and my son Joseph Rutledge, such of them as are in life, and to the lawful children of such as are dead.

Item 7th.—I desire and appoint James Cox trustee for my daughter, Ann Lee, and desire that he take all the interest in legacies, bequests, &c. given her, into his control and management, and manage for her interest during her life; and at her death, continue his trust, for the use and benefit of her children, until they shall arrive at the lawful age of twenty-one years.

And lastly, I appoint James Cox my executor, to execute and carry out this, my last will and testament, hereby revoking all wills, either verbal or written, heretofore made.

In testimony whereof, I do hereby acknowledge this, my last will, given under my hand and seal. In presence of

JOSEPH A. COLLIER, JAMES RUTLEDGE, [L. S.]
JAMES M. LOWE,
NATHAN PASSMORE,
THOS. P. PARK,

This 5th February, 1853.

JOSEPH A. COLLIER: Knew James Rutledge, deceased, from the time he moved into Harris County; had seen him often; was intimate with him; was frequently at his house. Measles, overseer of testator, came for him to go to testator's house, about his last will and testament; he went immediately after receiving the message—found one or two gentlemen there when he arrived; Passmore and Lowe were there. James Rutledge informed him, when he came into the room, that he had sent for him to witness his will. Mrs. Rutledge was not in the room at the time. The will was dictated, from beginning to end, by James Rutledge; and after it was finished, Dr. Park read it over distinctly to him. Rutledge said it was "all right," and signed it in the presence of the subscribing witnesses. He seemed as much in his mind as witness ever knew him. Witness saw no evidence of mental weakness on the part of testator—attested the will in the presence of testator and the other subscribing witnesses; they also signed it in his, testator's, and each other's presence. The will was written by Passmore and Dr. Park. Mrs. Rutledge is a lady of high, moral character—was a kind and attentive wife. After the will was finished and read over by Dr. Park, deceased made a correction, then requested prayer. Witness came at the request of Measles, overseer of testator, about the will; deceased wished to make a bequest to two little grand-children, and remarked, either that he had forgotten or that he did not know the given name of one of them—a little girl; requested witness to go and ask Mrs. Rutledge; witness did so; Mrs. Rutledge told him that she did not remember the name—to go and ask Sarah; Sarah told witness the name; Sarah is an old family slave; witness having learned the name, went back to deceased and told him the name, and deceased again went on with his dictation; Mrs. Rutledge came into the room once during the writing of the will—remained but a very short time—whispered something to deceased and went out of the room; after she went out, deceased again went on with the dictation, where he had left off when Mrs. Rutledge came. The instrument propounded

in this case was shown to witness, and he identified it as the will which he saw executed, and which he attested.

Witness testified that he lived about a mile and a quarter from testator, Lowe three miles, Passmore three miles, Park one and a half, and William Rutledge about the same distance as witness; Mrs. Emilina Rutledge had four children by Granberry—the youngest about 17 years old; two were living with her when the will was made, and two now—one returned from California; on being asked if he had not taken an active interest in the support of the will, witness said he felt an interest in any lady in Mrs. Rutledge's condition; brought her to Court to-day in her buggy; witness furnished the horse and she the buggy; has heretofore come in her carriage; he is a little lame, and it hurts him to ride horse-back much.

Dr. THOMAS PARK: Knew James Rutledge in his life-time; had known him only about 12 or 18 months; was not very intimate with him; was a physician, and practised a little in testator's family; on the day before the will was written, witness went there to see a sick negro; the old man was complaining, and he prescribed for him; he told witness he was going to make his will, and he wanted him to write it; witness smiled and told him he might live many days yet, but that he would write his will any day he would send for him. On the morning of the execution of the will, he went over, being sent for, and found the other witnesses there, and Passmore, writing the will; had written the caption; witness finished it; Mr. Collier sat by the bed-side, and the testator dictated to Collier, and Collier to witness. After writing the will, he read it over to testator, when he said, "that'll do," or "all right," or something to that effect. Testator signed it in the presence of the witnesses, and they attested it in the presence of the testator. Witness thought the testator was in his mind. After the will was written, or before it was finished, some one suggested that a negro woman, named Ann, was left out; does not remember who made the suggestion; she was then added. During the writing of the will Mrs.

Rutledge came into the room, conversed a little while deceased, and left again. After writing the will, witness gave it to Mrs. Rutledge; never knew testator before he moved to Harris County; he was confined to his bed, unable to sit up, when the will was made; all the while witness knew him he was quite infirm and feeble; rode about in his carriage, and walked with a staff; his mind was quite weak; was getting in his dotage; his mind kept pace with his body, in its approach to the grave. If he was a man of strong mind in Troup, his mind had greatly depreciated; but as witness did not know him then, he could not institute the comparison; witness regarded him as a man of ordinary capacity. While writing the will, testator failed to answer questions, and they examined him and found him asleep; they had to wait several times, and allow him to rest; that the disease was not at a stage where he considered James Rutledge dangerous; it had not affected his mind; the disease was pneumonia; it does not ordinarily affect the mind, except in the last stages; witness visited testator every day or two; he lived from Saturday to Saturday, eight days from the writing of the will; had been sick a day or two before the writing of the will; considered him in his mind until a day or two before he died; had taken some alterative medicine, but nothing to induce sleep; testator said, when his will was being written, that it was hardly necessary to make promise to pay his debts, as he only owed three dollars, which was to Dr. Yarborough.

NATHAN PASSMORE: Aided in writing the will propounded; that Dr. Park wrote the rest of it; that testator, Rutledge, dictated it; that when it was completed it was read over to testator; that testator said it was all right, and signed it in the presence of the witnesses, Collier, Park, Lowe and himself, and that the witness, subscribed to it as such, in the same room with the testator, and were, or might have been seen by him. Witness thought, while the will was being written, that testator was capable of making the will; but reflecting afterwards, that testator had forgotten the name of one or both of the grand-children named as legatees, and was obliged to have

them stated to him, in order to have them named as legatees, and being, subsequently to the execution of the will, informed that the children had been a good deal with him and were favorites of him, he was led to doubt, and still doubts, whether testator was able to make his will. Testator was from 60 to 65 years old, and very sick and confined to his bed all the time; witness doubts whether any one so sick as he was, could make a will; he rested frequently while the will was being written. While the will was being written, the name of Anna was first omitted, and on the reading over the will before its execution, testator directed the name of Anna inserted, saying that his wife would value her more highly than any other property given her. While the will was being written, dinner was eaten; Mrs. Rutledge did not dine with the company; witness thinks that it was after dinner that the name of Anna was inserted in the will, but about this cannot be positive; it was at the suggestion and request of the testator. Mrs. Rutledge was kind and affectionate to testator, and made him a good wife so far as witness ever knew or heard; testator was kind and affectionate. Witness thinks it was just as they came out of the dining room that the name of Anna was inserted. Witness was not prepared to say that the testator was of sound, disposing mind and memory.

JAMES M. LOWE: Called in the morning at the house of testator, and found him very sick; testator said to witness that he was very sick, and did not inquire after witness' family, which was very unusual with him. He attempted to vomit, and his wife held a vessel to receive it; she invited the company to leave the room; they did so, and remained out about a half or three quarters of an hour. The door was then opened, and Mrs. Rutledge invited the company to return, and a table, with pen, ink and paper, was found by the bed-side when the door was opened; witness was not in the room with testator while the will was being written, but came in when it was completed, to witness it, and did so. Testator was old, stupid and very sick; and witness thinks, he was not capable of making a will at the time; he lay on his bed,

propped up to sign it. After the will was signed, testator said it was all right, and requested prayers to be made. As witness was leaving, he said to testator, "Farewell," and held out his hand to testator; testator shook hands with witness at parting. Witness was then, and is yet, of opinion, that testator was not of sound, disposing mind and memory. Mrs. Rutledge was a kind and affectionate wife, and of good character, so far as witness knows.

WILLIAM RUTLEDGE: Testator was brother and close neighbor of him; lived in Troup County at the time of marriage; had a good house and plantation there, and was well fixed; the marriage took place in 1849 or 1851; they moved to Harris County to the place where testator died. Witness received no message to come to testator's house when the will was made, and never heard testator speak of making a will at any time after the marriage. Witness recommended testator to make a will when the late marriage was had, believing that testator had given her property, as testator had told him so; and testator told him he was satisfied to let the law make his will. Testator's first wife was a very laborious, industrious and acquisitive woman; was a mid-wife, and rode night and day in her vocation as such. The present Mrs. Rutledge was a near neighbor at the time of her marriage with testator, and was a very affectionate, industrious and neat woman. Witness recommended testator to marry her, and so far as witness knows, she made testator a good wife. She and testator always lived in peace and harmony, so far as witness knows. Testator advanced his children, and assisted them from time to time, many years ago; they were three in number—from 30 to 40 years old, and established in life; worth, two of them, $8.000 or $10.000 apiece, and one of them $3.000 or $4.000, at testator's death. Witness thinks he heard testator speak, once or twice, after his second marriage, of his sons not having treated the negroes he had given them well, and of his being indisposed to give them any more; but of that, witness is not positive. Testator was kind and affectionate. Witness was asked if the legatees had re-

ived their legacies under the will; he replied, that he did ot know. He was then asked where were testator's negroes? e replied, they were in possession of the legatees, he supposed. The Counsel for propounder asked witness if the caeators had not received their distributive shares under the ill? Counsel for caveators objected to it; that evidence on at subject was in writing; that there was a written agreeent which should be produced. Propounder's Counsel then aid to caveator's Counsel, "Well, produce it then." Caveaors' Counsel replied, "It is in your own possession—produce t yourself." The propounder then himself remarked, that he had it, but had left it at home," and the question was hen dropped; Counsel for caveators saying he would admit he distribution according to that agreement, and according o that only.

DR. BAUGH: Testator had a good house and plantation in Troup County; was very fond of his grand-children, one a oy, named William, about 15 years old, and the other a girl amed Eugenia, now about seven years old; she is, and has een usually called "Sis." Testator was kind and affectionte to his children, and they were obedient to him; he was ind and affectionate in his nature. The father of the grandhildren lived within two miles of testator, in Troup, and the rand-children were with him a good deal while in Troup. The children of testator were grown up and of moderate forunes. Witness married the widow of John Rutledge, and oarded in the Rutledge family before his marriage.

A. MEADOWS: Lived with testator the year before he made is will. That one morning at breakfast, testator fell asleep t the table, or fell into a state resembling sleep, as though e had lost his mind. His wife looked at him, and asked him hat was the matter, saying he looked like a fool. Testator eplied he felt like one. Mrs. Rutledge's manner was not nsulting or angry; they lived in harmony and peace.

JAMES M. LOWE, re-introduced for caveators, testified that short time before testator's death, he bought a horse for bout $40, and gave his note and witness as his security, and

witness knows this debt was not paid until after his death. The account of three dollars, to Dr. Yarborough, was called for by the testator the day after the will was written, and paid, and testator said he owed no other debt.

The interrogatories of MARY RUTLEDGE:

She did hear a conversation that Mrs. Emilina Rutledge had with her husband, James Rutledge—a conversation about making his will. The conversation was held at the house of James Rutledge, when he resided in Troup County, and to the best of her recollection, was sometime in the year eighteen hundred and forty-nine. In that conversation, Mrs. Emilina Rutledge told her husband he ought to make his will and give to Mrs. Lee more of his property than to any other of his children, as she had a hard time in this world; that her husband did not treat her well, and he ought to place it in good hands, so that she might enjoy it, and so that it would do her some good. To the 3d interrogatory, she answers: That she has heard Mrs. Emilina Rutledge frequently speak of the making of her husband's will, saying that he ought to make his will, as he had sick spells very often, and that he might drop off without having his will fixed as it ought to be. To the 4th interrogatory: That she has heard Mrs. Emilina Rutledge say, that all she married James Rutledge for, was to get his property; that it was a disgrace to her to marry into the family, and that she would not have married him if it had not been for his property; that her neighbors, some of them, were very sorry for her for marrying him; deponent knows nothing further that will benefit the caveators. She does not know that James Rutledge made a will; never saw any will of his; does not know which will the conversation was about; cannot swear that he ever made one. Witness is a daughter of Joseph Rutledge, and Saunders W. Lee married witness' aunt; James Rutledge, deceased, was witness' grandfather. Witness does not know what Lee and the Rutledges are worth; they own land and negroes, and as far as witness knows, are in tolerable condition in life. Witness says that her memory is tolerably good, and that her brother, John

utledge, and a daughter of Mrs. Emilina Rutledge, was present at the conversation referred to; her daughter was named Martha Granberry; does not know anything about the Rutledge boys treating Mrs. Rutledge badly; did not hear her say anything about it in the conversation referred to; did hear her say on one occasion, in speaking of uncle James Rutledge, that *he* had treated her badly, but that she had forgiven him. Witness has stated all of the conversation that she recollects, in her answers to the direct interrogatories, which he desires may be taken as her answers to this part of the cross-interrogatories.

The depositions of MARTHA BAUGH:

I have heard her speak of a determination to have a will made before his death; and heard her speak of the will after his death. Mrs. Rutledge said, before his death, she intended to have a will made, and never intended to let him rest until he did make one to her own notion, and she intended to have all that was willed to her, to do as she pleased with, or she would not have anything at all. I have heard her make these remarks, in substance, repeatedly, while in her company. The day after his burial, I heard her, while in conversation with Joseph Rutledge, ask him what would be done with the property? Joseph Rutledge replied, that he did not know what the will was. She replied, that as to her part, she knew very well what was willed to her. Joseph Rutledge said he did not know what to do, until he saw Mr. Lee. She replied, that Mr. Lee had nothing to do with it, and did not have the trappings of her finger. She then turned to William Rutledge, son of John Rutledge, and said she knew what was willed to John Rutledge's children. She also said she could have influenced the old man to give her anything she wanted, and his children might be glad that they got as much as they did. I have heard her say that she had an influence over him, and that she could influence him to make just such a will as she wanted. Her object was to have her part willed to her bona fide. I know nothing more that would benefit

the caveators. I am related by marriage; I was the wife of John Rutledge, brother to Joseph and James Rutledge; the caveators did not talk to me about the will; the conversations before his death, were at my house and at her house before she moved to Harris; that since his death, was, on the morning after his burial, at her own house; she universally commenced the conversation herself; I never made any reply; the conversation after his death, was with Joseph Rutledge the morning after his burial; I never made any remarks; the conversation was not directed to me. I have stated in my 2d direct interrogatory what led to that conversation; I was not, and had no idea that the will would be caveated; I did not, at any time, converse with Mrs. Rutledge about the will; she frequently talked about it in my presence, and I suppose it must have lain heavily upon her mind, and that she wanted more than the law would allow her, and willed so that she could do what she pleased with it. I never was requested to pick up any information respecting the case; he frequently complained of ill health; I do not think his mind was as good the last time I saw him, as it was when I first became acquainted with him; he was a man of industrious habits and had accumulated a fair fortune; I live some distance, and do not know much about Mr. Lee's circumstances, but I suppose he (with the other caveators) is in moderate circumstances.

MARY MILLNER'S depositions: I heard Mrs. Rutledge say at Dr. C. C. Gibb's hotel, in Hamilton, I suppose in May or June, that the children ought to feel themselves under obligations to her for what property was willed them; and Mr. Rutledge, after he had made his will, asked her if she thought she had land sufficient, to which Mrs. Rutledge said, she had.

I paid particular attention to what Mrs. Rutledge said: I never heard Mrs. Rutledge say that the children of Mr. Rutledge had mistreated him.

The depositions of Mrs. ELIZA CREWS: On about the 8th day of February last, I was at the house of the deceased, and Mrs. Rutledge told me that Mr. Rutledge had made a will,

but she was not in the room, and did not hear it read; but she supposed Mr. Rutledge had given her something. At a different time, Mrs. Rutledge said she influenced Mr. Rutledge to give her a smaller portion of land than he wished to give her.

We are near neighbors and friends, but I do not know that she communicates to me more freely than to others.

The depositions of Mrs. HANNAH LEE: Myself and Mrs. Rutledge did have a conversation previous to the death of James Rutledge, deceased; stated that she did not intend to let him, (her husband), rest until he made a will; that he (her husband) had not given her anything yet; that Mrs. Rutledge, above referred to, asked me if I thought that Mr. Rutledge was not easily influenced. I know nothing more that will benefit caveators to said will. The answers to the cross-interrogatories: I am the mother of Saunders W. Lee, one of the legatees in said will, as I suppose. I think it was in the Fall season of 1850; it was about two years previous to his (Rutledge's) death, or, perhaps, a little over. She did not say anything to me in regard to her desire, to have Lee's wife provided for, that I now recollect. I do not know what he is worth, but suppose he is worth some $30 or $40,000. I do not know what Joseph and James Rutledge are worth; I know nothing more that will benefit the plaintiffs.

The depositions of PAMELA BUTLER: During the life of James Rutledge, deceased, she heard a conversation between him and his wife, Emilina Rutledge, about the making of his will; heard Emilina Rutledge, repeatedly, ask her husband, James Rutledge, to make his will, and say that she intended making him do so; that he should never rest until he did make his will; he, James Rutledge, replied, frequently, that he never intended to make a will, that the law was sufficient for him. The above conversation took place in February or March, of the year 1851, in the town of Newnan, Coweta County, Georgia. The style, manner and conduct of Emilina Rutledge, was sometimes pleasing and persuasive, and sometimes commanding and coercive; that of James Rutledge,

calm and kind. Don't remember hearing Emilina say, "well, old man, I'm on the will again." 4th. She knows nothing more that will benefit the caveators, in relation to undue influence being exercised over the mind of said James Rutledge, only other conversations of the same nature of the one already stated in the answer to the 2d, direct interrogatory. Knows that the mind of James Rutledge was weak at the last time he was seen by witness, which was in July, 1852. She knows nothing about James Rutledge's children trying to get him to make a will to disinherit his wife; don't know that his brother and children ever attempted such a thing. I am the grand-daughter of James Rutledge, the daughter of Saunders W. Lee and his wife Ann, who is the daughter of James Rutledge. Don't remember who was present at the conversation stated in the second, direct interrogatory.

The interrogatories of ULYSSES B. FROST: He has had some business transactions with James Rutledge in his life-time. Some few weeks before the death of the said James Rutledge, I bought a load of cotton of him, in Columbus, and paid him for it; and after having completed the trade, it was proposed, either by him or me, and I don't remember which, that I should buy from him another lot of cotton which he had at home, consisting of some 9 or 10 bags, more or less, and that I should buy it blind, as it is sometimes termed; and after talking over the matter a few moments, as to the price, &c. I made a trade with him for said cotton, and at a price that I do not, now, recollect exactly; and, as I suppose, at the time, a trifle under the usual price of such cotton as it was represented to be. I had taken out my ticket-book and given him a ticket for the cotton, according to the usual custom; and then Mr. Rutledge remarked, that he was too hasty, that I must let him speak to his wife before the trade was confirmed, his wife being at that time near us, in a carriage; and after talking with her a few moments, she confirmed the trade, or rather consented to it; and I took the cotton, which was in a few weeks delivered to me, as agreed upon. I don't know that I can say anything very particular as to the condition of

his mind, at that time; I can only say that I did not consider him as quick and shrewd, and as vigilant, in a business transaction, as I had seen him formerly. In two or three instances, about that time, in paying him money, he would take it from the counter, and put it in his pocket without counting it, which circumstance I noticed at the time, and remarked upon it to some one. He cannot say that said Rutledge was not competent to transact ordinary business for some months before his death, but can only say, that the condition of said Rutledge was such, that a better trade could be effected with him, at that time, than with ordinary men; and, I should say, in a trade, advantage could have been more easily taken of him at that time, than at any earlier period of his life. He has not studied the science of Medical Jurisprudence, and is, therefore, not acquainted with it. He cannot say that James Rutledge was, at any time, insane. From 1837, up to the time of his death, I frequently met with the said Rutledge, and talked with him. I did buy said Rutledge's cotton a short time before his death, as stated above; and I am a cotton-buyer; I made from 3 to 5 dollars a bale on the cotton I purchased from him blind; and I traded with him; I think it was but a few weeks before his death that I saw him.

The interrogatories of ELIZABETH JAMESON: She is not particularly acquainted with the pecuniary condition of Mr. Lee and the Rutledges, and she cannot, therefore, state what they are worth; has understood, however, that Mr. Lee is a man of considerable property. She was present at the house of James Rutledge, some nine or ten days before his death, and the day before he made his will; and heard a conversation between Mr. Rutledge and his wife, in relation to the making of his will; was in an adjoining room to Mr. Rutledge and his wife when she heard the conversation. Mr. Rutledge told his wife he was going to make his will, and how he intended to make it. He told his wife he was going to give her five hundred acres of land, all the household and kitchen furniture, carriage and horses, buggy and two choice mules, a wagon, a choice yoke of oxen, cart, two choice milch cows and

calves, two choice sows and pigs, and the plantation tools, and his negroes: Daniel, Sarah, Jasper, Columbus, Washington, Georgia Ann, Sarah Frances, John, Andrew, and Anna He also said he was going to give her the watch she wore. He asked his wife if she would be satisfied with the property he intended giving her, and his wife replied that she was perfectly satisfied, and that she wanted him to make *his* will and not *hers*. It was some nine or ten days before the death of Mr. Rutledge, when the above conversation was had. Mrs. Rutledge, the widow of James Rutledge, is her mother.

The interrogatories of MOSES JONES:

He sold James Rutledge the plantation on which he last lived in Harris County, and on which the said James Rutledge lived the last time he saw him, containing nine hundred and ninety-six acres; he said nothing of securing his wife a home, at the time of the purchase. In July, 1851, he asked me to show him the lines of the land I sold him, and also give him the numbers of the land; and he stated to me, at that time, that he was going to make his will, and secure the settlement of the plantation on his wife for a home. It was not convenient for me to grant his request, though often requested so to do, until about the first of January last, at which time I showed him the lines of the land, and gave him the numbers of the lots and parts of lots. He asked me where would an open line run, so as to secure the orchard on the place with the house—giving his wife five hundred acres or thereabouts—so as not to injure the other part of the plantation; and I showed him where I supposed the line would run, and he stated that he was going to execute his will that way, at the first convenient opportunity.

THOMAS GRANBERRY: Lived for some months with testator and his mother, Mrs. Rutledge, while they were in Troup; that testator's children did not often visit testator while witness lived with testator and family; that testator's children by his first wife were grown up and established; that testator seemed to love his grand-children, and some of them boarded with him.

GEORGE GRANBERRY: The time the will was made, he dispatched a messenger, a negro, for William Rutledge, a brother of testator, who did not come; that witness is a son of Mrs. Rutledge, by a former husband; lived in the house of testator, and mother of witness; was well acquainted with testator; that testator, during his last illness, until a day or two before he died, retained his mind, conversed intelligently and gave directions about his affairs as usual. Witness thinks testator's mind was clear and strong enough to make his will, at the time it was executed.

Cross-examined: Witness testifies, that he lived in the family while they were in Troup; that Mr. Rutledge had occupied, then, a good two story framed dwelling, comfortable and pleasant; had a nice lot and some land about it; lived in the village of LaGrange. Witness heard Mrs. Rutledge, mother of witness, say, that bad feelings existed between her and one of the caveators. Here witness was about stating the explanation of that bad feeling, which explanation was connected in the same sentence with the admission of the existence of bad feeling by Mrs. Rutledge, when Counsel for caveators objected to receiving that part of Mrs. Rutledge's statement to witness, which contained the explanation of the bad feelings referred to. Counsel for propounder insisted on proving the whole of Mrs. Rutledge's statement, but the Court sustained the objection of caveator's Counsel and rejected that part of the statement of Mrs. Rutledge, which explained the bad feeling which, in the same sentence, she had admitted to exist.

BLOUNT C. TERRELL: Had known testator since 1841; he always walked with a staff; was a little lame. While in Troup, testator was regarded as a man of good mind, and kind and affectionate, and lived well with his children by his first wife, the caveators, and the caveators were kind to testator.

STRIBBLING: Knew James Rutledge, testator, from the time testator moved into his neighborhood; was very frequently at testator's house; considered testator a man of active mind, because he attended to his own business when he had

no overseer; he directed his overseer, when he had one; died eight days after the writing of the will; witness was at testator's house several times during the interval between the writing of the will and testator's death; considered testator perfectly "at himself," i. e. his mind as good as ever it was; heard testator question overseer about his farm, a night or two after the writing of the will; testator asked the overseer where the negroes were at work, meaning at what particular portion of the farm they were then engaged; the overseer having informed him, testator expressed his approbation and added some further directions; this was but a very short while before testator's death; considered testator as rational as any old man of his age and his condition; knew testator two years, and he had an overseer all this time. He heard testator request his wife to go with him to Columbus, when the cotton was sold; that she rather objected, and that he insisted, saying to her that he wanted her society.

It was admitted that the estate of the testator was worth forty thousand dollars, and the legacy given by the will to Mrs. Rutledge, worth eleven thousand dollars.

RAMSEY; WELLBORN, for plaintiff in error.

MOBLEY; B. H. HILL, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Was the Court right in excluding so much of the testimony of Thomas Granberry, as explained the origin, nature and extent of the "bad feeling" exhibited by Mrs. Rutledge, toward one of her step-children, and caveators of the will?

Counsel for the caveators had drawn from the witness the fact, that this hostility was, or at least had been, entertained. He conceived it to be legitimate testimony; and we think it was. Here was a marriage, bringing together two sets of children—those of the husband and those of the wife—by their former marriages. A will is made, discriminating

rgely in favor of the present wife, and against the children r the first wife. It is alleged to have been produced by the due influence of the wife over the testator, who was a fee- e and infirm old man. Is it not natural, under such cir- mstances, to inquire into the character of the relations hich existed between the last wife and the step-children? Upon reading the will, and seeing the difference in the tes- tor's bounty, would not the question occur to the mind—are ese the children of the testator's wife? And could you t show that they were not, in order to account for the dif- rence in the testamentary bequests to her and to them?

And if so, would you not pass, by an easy step, to the fur- er fact, as to the state of feeling between the parties? I ow, from observation, that step-mothers and step-children, s well as mothers-in-law and daughters-in-law, are natural nemies. There are, however, exceptional cases. And to eir credit be it spoken, there are some step-mothers who, the world at least, exhibit the same kindness to their step- ildren as to their own offspring.

If such were the terms upon which this family lived, might not have been proven? And if the contrary was true, ight it not have been shown?

We are clear, therefore, that Counsel for the caveators sked a proper question, when they interrogated the witness, ranberry, as to the enmity between Mrs. Rutledge and one f the caveators. And we are equally well satisfied, that the ourt should have permitted the examination to have been rosecuted further; and that the witness should have been llowed, as he was proceeding to do when stopped by Coun- el, to have explained the cause and extent of the difficulty.

Suppose it should have turned out, as we have reason conjecture it would, from another part of the record, that hatever unkind feeling may have been engendered, it had ing since passed away and been forgiven and forgotten, ould not the Jury had a right to infer that it had ceased to perate as a motive for causing to be made an unequal will?

It is like the case of a Juror who, by the expression of a crude and unformed opinion, disqualifies himself to sit on the trial; but upon further examination, it is found that the language he used, was the mere ebullition of the moment; and he is pronounced by the Court or triers, a competent Juror.

We further affirm the judgment upon every other assignment but the first, and regret that we are forced, by the imperative terms of the Transcendental and Judicial Perfectability Act of the last Legislature, to remand the cause for a re-hearing, upon this ground.

No. 35.—WILLIAM LICETH and others, plaintiffs in error, *vs.* HOWELL COBB, Governor of Georgia, &c. defendant in error.

[1.] A bail bond in a criminal case, contained a condition to this effect: that if the said A B should appear at the next term of the Superior Court, to answer the charge, and well and truly to abide by the finding of the Court in the premises, then the bond was to be void: *Held*, that A B was no bound to appear before indictment.

Scire Facias. Lee Superior Court. Decided by Judge WORRELL, March Term, 1855.

This was a *scire facias* to forfeit an appearance bond, given by William Liceth and others, his sureties. The condition of the bond recited, that "whereas, the above bound William Liceth has been committed, in a case of the State against said Liceth, for an assault with intent to murder. Now, should the said Liceth be and appear at the next term of the Superior Court for said county, to answer the said charge, well and truly abide the finding of said Court in the premises, then the obligation is to be void, &c.

Counsel for the defendants demurred to the *sci. fa.*: 1st. ecause neither it or the bond, disclose the cause of the capre and detention of said Liceth.

2d. Because they do not show the authority of the Magisate to take the recognizance, or that there was any examtion of the said Liceth before any committing Court.

3d. Because neither the *sci. fa.* nor the order of forfeiture owed that any charge was ever preferred on account of id alledged crime, before the Grand Jury, or any indictnt or other proceeding thereon. The Court over-ruled the murrer, and defendants excepted.

Defendants also pleaded that the said Liceth, in fulfilnt of the condition of said bond, did appear at the said rm of the Court to answer said charge, but that none was eferred against him.

On motion, the Court struck out this plea, and defendant cepted.

On these exceptions error is assigned.

STROZIER & SLAUGHTER, for plaintiff in error.

SOL. GEN. LYON; HAWKINS, for defendant.

By the Court.—BENNING, J. delivering the opinion.

[1.] We think that the import of the condition of this bail ond is, that the principal was bound to appear at the term of ie Court mentioned in the condition, *to answer to any indictment* that might be made against him. For aught that to be seen, there was—there could have been, no other obct for requiring his appearance. Did not this principal, fter the giving of this bond, become free of all but his bail, go where he pleased, until he should be indicted for the ffence mentioned in the bond? Could the State, as long as e might remain unindicted, take any additional step against im? If so, what additional step could it take? Could the uperior Court, as a Court, take notice of the case before the

case had come to exist in that Court? And it is only by dictment or presentment, that a criminal case can exist the Superior Court.

In the opinion of this Court, there could be no breach the condition of this bond before indictment; and, therefo no forfeiture of the bond before indictment.

We think, therefore, that the want of an indictment w good ground of demurrer to the *sci. fa.*; and, therefore, t the Court below, should, on that ground, have sustained t demurrer to the *sci. fa.*

As to the other grounds, we think it not necessary or pr er to express an opinion on them.

No. 36.—THOMAS SWEARINGEN, plaintiff in error, *vs.* NAN SWEARINGEN, defendant in error.

[1.] In a libel for divorce, at the instance of the wife, it is the duty of Court to institute some inquiry as to the authority for bringing the s where suspicion has been cast upon the *bona fides* of the proceeding.

Motion, in Baker Superior Court. Decision by Jud PERKINS, May Term, 1855.

Nancy Swearingen made application for temporary ali ny, pending a libel for divorce against Thomas Swearing The defendant below proposed to show, by testimony, and manded a Jury to try the issue, that the libel was filed the instigation of the children of libellant, and not by h wish; that she had forgiven him the alleged adultery, which the divorce was sought, and that her children kept h away from the bed and board of the defendant. This is t substance of the evidence offered. The Court refused to ha

the issue, and granted $30 per month for alimony, and $250 Counsel fees. This decision is assigned as error.

MILLER & HALL, for plaintiff in error.

WARREN & WARREN, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

Ought not the Judge to have instituted some inquiry as to the *bona fides* of this suit?

We are constrained to say, that under the suspicion cast upon it by the response of the defendant, that this should have been done.

Two things, only, are necessary to entitle the wife to temporary alimony—marriage and the pendency of a suit for divorce. In Roseberry's case, where the marriage was denied, we directed a preliminary proceeding to try that issue, before ordering the husband to provide for the maintenance of the wife, and advance money to pay her Attorneys.

This is the first case where the pendency of the suit has been questioned; and while it is apparent that the docket spread out before the eyes of the Judge testified to the existence of such a suit; still, if there was reason to suspect that the action was not brought by the consent or direction of the wife, especially where such serious and important consequences were involved, we think the Court should have instituted an examination into the matter, so as to satisfy itself, at least, that the action was authorized.

Mrs. Swearingen could, if able, have been brought to Court and given personal assurance of the authenticity of the proceeding; or if, from physical infirmity, she was unable to attend a warrant or power under her hand, duly attested by some Magistrate, would have sufficed. But here the Court did not even require Counsel to state, in their place, that they had been employed by the plaintiff to bring this action, notwith-

standing the suspicion cast upon it by the oath of the defendant. No delay would have resulted from this course; and we think it should have been pursued.

No. 37.—JOHN BANKS, plaintiff in error, *vs.* HENRY D. DARDEN, for the use of Eugene L. Jerrenaud, defendant in error.

[1.] The Act of 1853–'4, relative to continuances, only requires the statement as to what the applicant expects to prove by the absent witness, to be reduced to writing; it need not be sworn to.

[2.] The 4th part of the 6th section of the charter of the Planter's and Mechanic's Bank of Columbus, is in these words: "The total amount of debts which the said corporation shall at any time owe, whether by bond, bill, note or other security, shall not exceed three times the amount of their capital stock actually paid in, over and above the amount of specie actually deposited in the vaults for safe-keeping. In case of excess, the directors under whose administration it shall happen, shall be liable for the same in their private and individual capacities, and may be sued for the same in any Court of record in the United States, by any creditor of the corporation: any condition, covenant or agreement to the contrary, notwithstanding; but this shall not be so construed as to exempt the said corporation, or the lands, tenements, goods and chattels of the same from being liable for and chargeable with said excess:" *Held*, that the liability of the directors is not penal but remedial; joint and not several; and neither absence nor dissent will relieve a director from liability.

[3.] A Statutory remedy, in derogation of the Common Law, must be strictly pursued.

[4.] Distinction as to contracts between parties and obligations, *ex quasi contractu*.

[5.] Bank books are competent evidence, both for and against the corporation; it is admissible, however, to prove by *parol*, independent facts, such as the division and distribution of stock and the issuing of a large amount of bills or notes.

[6.] When books are admitted in evidence, they are testimony before the Jury as to all entries appertaining to the same transaction; still, the party

offering them may select and read to the Jury such portions as answer the purpose for which they were introduced by him, leaving it to the opposite party to submit any other parts that he may see fit.

7.] If A's title to negotiable paper be good and he transfers to B, B claiming under A's title, will be protected; and a demand by A or his agent will enure to the benefit of B.

8.] The charter of the Planter's and Mechanic's Bank of Columbus does not require that the whole amount of the capital stock should be paid *in specie*, but twenty-five per cent. thereof or $250.000 only. And in order to charge the directors, it must be shown that there was an excess, and that it happened during their administration, viz: that the total amount of debts which the corporation owed, exceeded three times the amount of capital stock actually paid in at that time.

Assumpsit, &c. in Muscogee Superior Court. Tried before Judge WORRELL, December Term, 1854.

This was an action brought by Henry D. Darden, for the use of Eugene Louis Jerrenaud, against John Banks, to recover the amount of two certificates of deposit, varying only in amount, of one of which the following is a copy:

$5.264 $\frac{12}{100}$ "PLANTER'S & MECHANIC'S BANK,
Columbus, Georgia, Sept. 22, 1841.

John Peabody has deposited to the credit of D. McDougald, Five Thousand Two Hundred and Sixty-four $\frac{12}{100}$ Dollars, which will be paid to his order on return of this certificate, in current notes. M. ROBERTSON."

Endorsed, "Pay to H. D. Darden, Esq. without recourse to me, D. McDOUGALD,
By J. PEABODY.

Pay to the order of F. Cottinett, Esq. without recourse to me."

Across the face written, "Protested for non-payment, 15th Dec. 1842. Protested 16th June, 1842.
JAMES KELLOGG, N. P. Fees $3."

The ground of liability relied on, was that Banks was a Director and President of the Bank, and that there was an over-

issue more than sufficient to pay these certificates, by means of which, under the charter, the directors were personally liable to any creditor.

The defendant filed, among other pleas, the following:

4th. That there were seven directors of the bank, and that the others should have been joined with him.

5th. That plaintiff's right of action did not accrue within six months next before the commencement of his suit.

6th. That it did not accrue within four years next before the commencement of the suit.

7th. Was a similar plea of the Statute of Limitations of four years.

8th. That defendant, at the time of the issuing of the said certificates, was absent from the State of Georgia, and in no wise acting in the matter.

9th. That there were four other directors (naming them,) who were liable jointly with defendant, and should have been joined with him.

10th and 11th was a re-production of the 5th plea.

12th. That the certificates sued on, were issued and delivered to Daniel McDougald, for the purpose of being used by him to raise money for the bank; that he paid nothing into the bank for them; that he subsequently fraudulently used them for his own purposes; that the bank refused to pay them in June, 1842, and that the plaintiff took them with full notice.

At December Term, 1854, defendant announced himself ready, if the plaintiffs had fully answered certain interrogatories propounded to them by defendant, under the Act of 1847, and the several Acts amendatory thereto. On examination, it was found that the plaintiff, Darden, had filed answers, but that Jerrenaud had not answered at all; whereupon, the defendant's Counsel moved the Court to non-suit the plaintiffs, which the Court refused. The defendant's Counsel then moved the Court that an attachment issue to compel Jerrenaud to answer the interrogatories; which motion the Court refused, for the reason, that it was shown, to

the satisfaction of the Court, that Jerrenaud was in Europe when the interrogatories were taken out, and had not returned, and had no opportunity of answering them—the same having been served on the Counsel. The Counsel for defendant stated to the Court, that he required and insisted on the answers of Jerrenaud, and should object to the case proceeding, until they were had. The Court decided that the defendant was entitled to them, and that it was in the power of the Court to continue the case to obtain the answers; and if a motion was made for that purpose, it would be considered; whereupon, the defendant's Counsel moved that the case be continued at the instance of the plaintiffs, and they be ordered to file such answers; which motion the Court also over-ruled, so far as to charge the plaintiffs with the continuance. The defendant's Counsel then moved to continue the case, upon the ground that said answers had not been filed; whereupon, the Counsel for plaintiff objected, unless the defendant would state, under oath, what he expected to prove by Jerrenaud. The Court held and ruled, that the defendant being in Court, should state, in writing, under oath, what he expected to prove by the answer of Jerrenaud, and that the plaintiff should have the liberty of admitting it, if they thought proper to do so; and that in that event, that he should over-rule the motion for a continuance. The defendant's Counsel declining to do so, the motion for a continuance was over-ruled by the Court, and the trial ordered to proceed. To all of which decisions and rulings of the Court, in regard to the answers of Jerrenaud, and the several motions made by defendant's Counsel, the defendant's Counsel excepted.

The defendant's Counsel demurred to plaintiff's declaration; and for cause of demurrer, alleged that the plaintiff's suit, as shown by his declaration, was brought to recover of the defendant, as director of the Planter's & Mechanic's Bank of Columbus, his debt against the said bank, on the ground that the bank had contracted liabilities to the amount of his claim, more than three times the amount of the capital stock

of said Bank actually paid in, over and above the specie deposited for safe-keeping; and that the Statute incorporating said bank did not authorize any such suit as that instituted by the plaintiffs. Also, that if the Act of incorporation made the directors liable at all, they were jointly, and not severally liable, and that the plaintiffs could not sue a single director. The Court over-ruled the demurrer and objections of defendant's Counsel, and held the suit properly brought.

To which decision and ruling of the Court, defendant's Counsel excepted.

Plaintiffs' Counsel then demurred to and moved to strike the several pleas filed by defendant, and numbered 4, 5, 6, 7, 8, 9, 10, 11 and 12; and after hearing argument, the Court sustained the demurrer and ordered said pleas to be stricken, not striking No. 9 for want of affidavit, but on merits, defendant offering to amend.

To which ruling and decision, the defendant's Counsel also excepted.

These pleas will be found in the former part of the statement of the facts.

Plaintiff's Counsel then introduced ABRAHAM B. RAGAN as a witness, who testified that the persons incorporated by the Act establishing the Planter's & Mechanic's Bank of Columbus, met in Columbus in the Spring of 1837, for the purpose of organizing the bank, and the stock was all taken and divided out between the corporators; that some of them had money in bills of specie paying banks—a few had some specie, and others offered to make good notes. A committee of the stockholders were appointed to take the specie, bills and notes made by the stockholders, and make an arrangement with the Bank of Columbus, for the amount of specie, necessary for the organization of the said bank; that said committee did make an arrangement with the Bank of Columbus for specie certificates, stating that the stockholders had on deposit in said bank, in specie, the sum of two hundred and fifty thousand dollars, and delivered and turned the same over to the stockholders; whereupon, seven directors were

cted, one of them chosen president, and a Mr. Peck elected
hier.

Plaintiff's Counsel then proposed to prove by the witness,
t some short time thereafter, the directors divided out
stock so paid in, amongst the stockholders who had paid
n. The defendant's Counsel inquired of the witness, if the
ectors, after the said organization, did not keep a record
minutes of their acts as such, and whether the action of
board, in relation to said disposition of said stock, was
recorded in said minutes. Witness answered in the affirm-
ve; whereupon, the plaintiffs' Counsel proved, by William
ugherty, defendant's Counsel, that some three years since,
had the minutes of the bank in his possession; that he de-
ered them to Dr. Flewellen, on an order from Judge Alex-
der, the assignee of the bank, to be used in a law-suit in
abama. Witness, a short time thereafter, inquired of Mr.
nt, the Counsel for Dr. Flewellen, for the minutes, and was
formed that they were left at Col. Holt's office—since which
ne witness has not seen them, but was informed, a short
ne since, that they were in the possession of a gentleman
this town; whereupon, defendant's Counsel objected to the
tness testifying to said transaction, as there was better ev-
nce of the facts sought to be proved, to-wit: the said min-
es of said bank. The Court over-ruled the objection, and
e defendant's Counsel excepted.

The witness testified, that some two or three weeks af-
r said organization, the directors passed an order, dis-
unting or loaning out the money so paid in, except two per
nt. reserved for expenses, giving the stockholders the pref-
nce, upon their making good notes, well endorsed, with
e understanding that the same should be paid back when
lled for. Under this arrangement, the stockholders, gen-
ally, made their notes, and drew out the money paid in, ex-
pt the two per cent.; and the witness now only remembers
single instance where the stockholders did not take the
oney, and the same was given on the note of another per-
n, not a stockholder. This was done for the reason, that

the directors determined not to engage, at that time, in banking, on account of the derangement in money matters. About that time, all the banks in Georgia, and generally throughout the United States, having suspended specie payment. Witness thought that this derangement was not much worse when the money was discounted out, than when paid in, but was getting gradually worse. Plaintiffs' Counsel proposed to prove by Ragan, that defendant acted as a director in 1837. Defendant's Counsel objected; the Court over-ruled the objection, and the defendant's Counsel excepted. Witness testified, that defendant was a director at the first organization of the bank, but resigned before the order was passed, loaning out the stock paid in, as before stated. Witness further stated, that a new set of directors, and president and officers, were elected in February, 1838, at which time the defendant was elected a director, and when it was resolved to commence banking business; and the directors ordered the issuing of bills to the amount of 280 or 300.000 dollars. At this point, defendant's Counsel inquired of the witness, whether the order and action of the directors, in issuing said bills, was not recorded on the minutes of said bank. Witness answered in the affirmative; whereupon, defendant's Counsel moved to withdraw or suppress the said testimony, as there was higher and better evidence of the same.

The Court over-ruled the motion, and the defendant's Counsel excepted.

Witness testified, further, that the directors, after said second organization, and before issuing said bills, called in 50 per cent. on the notes so given for said stock so loaned. Some fifty or sixty thousand dollars were paid in, in current funds of the State, the bills of suspended banks, except about five hundred dollars, which was paid in in specie, whilst witness remained in said bank, which was until about October, 1838, since which time he has had no connection with said bank; that Matthew Robertson was acting as cashier of said bank, in September, 1841.

Plaintiffs' Counsel introduced, as a witness, THOMAS J.

IVERS, who testified, that he was the book-keeper in the nter's and Mechanic's Bank, from about 1839 to 1842; t the books shown him were the teller's settlement, the h book and the book showing the statement of the bank. itness also proved that defendant, John Banks, was a director the time he was in the bank, and was president for a while 1841, and thought he was in September, 1841. He went to w York to borrow money for the bank, as much as twice, ring the year 1841. Witness proved that he aided in fill- up other bills, besides those stated in the issuing books, and t he knew the teller to put some of them in circulation, d he saw them in circulation.

Plaintiffs' Counsel then offered in evidence, the first page the teller's book.

Defendant's Counsel objected to the same, unless the whole ok should be considered in evidence, to be used by either rty, and the more especially without the second page re- red to, in the first; the plaintiffs' Counsel stating that fendants might introduce the part or parts referred to, if y thought proper. The Court over-ruled the objection, d the testimony was admitted, and the defendants excepted. The plaintiffs' Counsel then offered in evidence, the single m in each and every teller's settlement, from the first to the . October, 1841; the same being made every three or four s, showing the amount of specie in the bank on the day settlement or statement was *made*, and the entire settle- nt of 16th September, 1841. The defendants' Counsel jected to the same going in evidence, unless the whole settle- nt or statement was offered or went with it; the plaintiffs' unsel stating, that they might read the balance if they ught proper. The objection was over-ruled, and the evi- nce, as offered, admitted; to which ruling, defendant's unsel excepted.

Plaintiffs' Counsel then offered and read in evidence, the rtificates of deposit mentioned in plaintiffs' declaration, and certificate of protest by the notary, Kellogg, and his de-

positions, proving that he presented the certificates at the counter of the bank on 15th June, 1842, and demanded payment, which was refused.

Plaintiffs' Counsel also offered so much of the cash book of the Planter's & Mechanic's Bank, as showed any transaction of Daniel McDougald with said bank, from the 1st. of September, 1841, to 21st October of the same year, inclusive.

Plaintiffs' Counsel then offered in evidence, that part of the books showing the state of the bank on the 17th, 20th, 23d, 27th September and 1st. October, 1841.

Plaintiffs' Counsel having closed his case, defendants' Counsel submitted a motion to non-suit the plaintiffs, on the ground that they had failed to prove any demand on the bank for payment, or an offer to return the same by the plaintiffs before the commencement of the suit or afterwards, and that the proof showed that the demand that was made, was by one who was not the holder of the certificates, and who had no right to demand or receive payment. The Court over-ruled the motion and the defendant's Counsel excepted.

Defendant then introduced MATTHEW ROBERTSON as a witness, who testified, that in the Spring and Summer of 1841, the bank was hard pressed for funds to get along with its business, and it was suggested and recommended by its then president, who was Daniel McDougald, that there should be issued some certificates of deposit, and which should be sent to New York to an agent, to be sold in that market to raise money for the bank, as northern exchange was at a high rate; that southern funds were at a discount; and that witness issued a few, and they were sent on for that purpose. After that time, McDougald resigned the presidency, and the defendant was elected, and the bank still being in great want of money, the defendant left Columbus for New York for the purpose of raising money on his individual credit, and that of his associate directors, to sustain the bank, about the 1st. September, 1841, and returned about the first October thereafter. Whilst the defendant was in New York, and witness thinks about the date of said certificates, the bank was very

much pressed for money; which fact, witness communicated to McDougald, who professed to be friendly to the bank, who immediately suggested to witness, to issue more certificates of deposit, and send them to New York, stating that all the banks had been driven to, and were engaged in that business, and stated to witness that he was going to New York himself, and if he would issue them he (McDougald) would take them on and aid all he could the defendant, who was then in New York, and the agent of the bank, Mr. Clark, in raising money on them.

That witness did adopt the suggestion, and issued a number of said certificates and handed them to McDougald, to be carried to New York for the purpose, and as before stated, and that he, the witness, is not positive, but thinks that the certificates sued on in this case, and shown to witness, are a portion of the batch of certificates issued and placed in the hands of McDougald, as before stated; that if they are a portion of that batch, no money was ever deposited in said bank for them; that the bank never received the smallest consideration for them, and that they were issued as before stated; nor did the bank ever receive anything from them in the way of proceeds or otherwise, from that time up to the time it closed doors and failed.

Mr. ROBERTSON cross-examined: Stated that he could not state positively that the certificates sued on, were those delivered to McDougald, as before stated, but he thought they were, and the only reasons he supposed they were, was that they bear date about the time that the transaction occurred, and they were for odd sums, which those certificates were issued for; and that in testifying that they were a part of those certificates so delivered to McDougald, he spoke more from his recollection and impressions when those certificates were first shown him, (which was several years since,) than from his recollection at this time; and when he first saw them, he thought they were a portion of those certificates. Witness further stated, that in making up the accounts of the bank, that they were never *forced*, and that on examining the cash book and

finding the certificates of deposit sued on charged, and the account balanced, it would seem that the money was deposited for which they were given, and would be so unless the money was there or something to represent it; that it was their custom, in transactions of this character, and such as was not completed, and were to stand but a short time, to make what they called "cash memorandums," which stood in the accounts of the bank in the place of cash, and referred to the item, cash memoranda, in the state of the bank, Sept. 16th, 1841. On being further cross-examined, and asked if he had not sworn, on a former occasion, that the bank had received consideration for those certificates, witness answered that he did not remember; and on being asked if it was shown that he had so sworn, which would he say was right or correct, what he swore then or now? Witness stated that he should sooner rely on what he then testified to, as the matter was then fresh in his mind; and on being shown his answers to a former set of interrogatories, and being asked what he now thought in regard to said certificates, witness stated that he thought he was now mistaken in saying that the certificates sued on, were of those delivered to McDougald, as testified to on direct examination.

Witness' attention was then directed to the entry on cash book, of certain bills of exchange drawn by McDougald on Cottinett, on 11th October, 1841, and testified that they were drawn and used to raise money on for the bank, but they had no connection whatever with the certificates sued on, and was an entirely distinct transaction.

Mr. ROBERTSON, re-examined by defendant's Counsel: Stated that his recollection was distinct as to issuing a batch of certificates and delivering the same to McDougald, as testified to, but his difficulty was, whether the certificates sued on were some of them; and being again shown his answers to said former interrogatories, he was requested to examine closely, both the interrogatories and answers, and to state whether there was anything in them to change the impressions which he had when he first saw said certificates, as to

their being a part of those delivered to McDougald, as testified to on direct examination, and after re-examining said interrogatories and answers, witness stated that he did not see anything to change his first impressions; that they were a part of the certificates delivered to McDougald.

Defendant's Counsel then offered and read in evidence, the depositions of FRANCIS COTTINETT, in which he testified that the certificates sued on once belonged to him, and were transferred to him by Daniel McDougald. They were then indorsed in blank, "D. McDougald by J. Peabody;" thinks he received them about 15th Sept. 1841. He sent them in Feb. 1842, to H. D. Darden, to be invested in cotton; he failed so to invest them, and they were returned to him; he was the owner of them in June, 1842, and sent them to his lawyer in Columbus; he paid McDougald for the certificates, by honoring his checks; it was a transaction on joint account with McDougald.

The Court charged the Jury, amongst other things, as follows: That if they believed, from the evidence, that the Planter's & Mechanic's Bank made the certificates of deposit sued on, and that Darden, the plaintiff, was the owner of them, and that the bank, at the time of issuing said certificates, owed more than three times the amount of its capital stock actually paid in in specie, over and above the amount of specie in its vaults for safe-keeping; that such excess was equal to or exceeded the amount of said certificates, and that John Banks, the defendant, was a director of said bank at the time of such indebtedness; that then, the plaintiffs' case was made out.

He further charged the Jury, that if they believe, that on the organization of the bank, in February, 1838, when it commenced issuing bills, and until October of that year, only the sum of eight hundred or one thousand dollars, or whatever sum it was, had been paid in specie, that the law presumed that no more was paid in after that time; and if there had been, it was incumbent on defendant to prove it, it being.

the opinion of the Court, that by the charter of said bank, its capital stock was to have been paid in specie; and, unless so paid, it was not to be considered as any payment at all.

The Court also charged the Jury, that if they believe that the certificates were placed in the hands of McDougald, for the purpose of raising money on them, the law presumes that he did so: and if Cottinett took them of McDougald, the law presumes that he took them fairly, and that he paid value for them; and that the law presumed, and the Jury were bound to presume, that Cottinett took the certificates before they were dishonored, until the contrary appeared.

The Court also charged the Jury, that if they believed that Darden took the certificates of Cottinett after they were dishonored; yet, if they believed that Cottinett took them before they were dishonored, that the defence relied on could not be set up against Darden, unless they believed that Cottinett took them with knowledge that McDougald misapplied them.

The Court also charged the Jury, that if they believe, from the testimony, that McDougald and Cottinett purchased the certificates in partnership, the law presumes they paid value for them, and came by them fairly.

The Court charged the Jury, that if they should believe, from the testimony, that the certificates were placed in the hands of McDougald to raise money for the bank, and that he transferred them to Cottinett, and that Cottinett afterwards drew bills of exchange and paid the bank for them, they were entitled to hold them.

The Court further charged the Jury, if they should believe, from the evidence, that the certificates were issued by the cashier, at the instance of the president, for the purpose of borrowing or raising money, they were good against the bank, and constituted a debt, although no money was deposited, provided that was not known to Cottinett when he took them. And if so, he was not affected by it, and the bank was bound to pay them. To all of which charges, as given, defendant's Counsel excepted.

Defendant's Counsel requested the Court to charge the

Jury, that in the first organization of the Planter's & Mechanic's Bank, it was not necessary that each and every stockholder or subscriber should have in his possession, and by his own hands pay, twenty-five per cent. of the amount of stock subscribed; but if the Jury should believe, from the testimony, that the stockholders, *bona fide*, had individually or collectively, in the Bank of Columbus and the Insurance Bank, in specie, twenty-five per cent. of the capital stock held by them, and placed, in good faith, that specie under the control of the stockholders, or a committee of the stockholders, or other person authorized to receive it, that such payment would be a compliance with the charter. Which charge the Court refused to give in the language requested, but charged the Jury, that the charter required the twenty-five per cent. of capital stock to be actually and *bona fide* paid in, before the bank could do any business; or it should have that amount on hand; and although it was so paid in, if it was afterwards distributed out amongst the stockholders, or otherwise put out, and at the time the bills were issued, the bank did not have this specie, and in place of it, commenced business on notes given for it, the same was not a compliance with the charter.

Defendant's Counsel also requested the Court to charge the Jury, that it was not necessary, under the charter, that the bank should always keep and have on hand an amount of specie equal to one third of the debts and liabilities of the bank. Which charge the Court did give; and further charged, that the charter of the bank required the stockholders to pay in $250.000 of the capital stock in specie, before commencing business. If this was done, the charter was complied with; and if the debts of the bank did not exceed three times that amount, there was no excess.

Defendants' Counsel also requested the Court to charge the Jury, that if they believe, from the testimony, that Darden obtained the certificates of deposit after they were dishonored, that the defendant could make the same defence that he could make if the suits had been instituted by McDougald;

this charge the Court refused to give, and charged the Jury, that if they should believe, from the evidence, that Cottinett took the certificates innocently and before they were dishonored, and Darden afterwards obtained them from him after dishonored, yet Darden could hold them from the defence that might be set up against McDougald.

Defendants' Counsel also requested the Court to charge the Jury that one partner will be effected by the fraud of another in their partnership dealings; and if the Jury believe that if the said certificates were given to McDougald to raise money for the bank, and improperly put into circulation by McDougald, and that Cottinett was in co-partnership with McDougald in the use made of the certificates and their misapplication, that he would hold them just as McDougald did, and that the same defence might be urged against him that could be against McDougald; which charge the Court gave and qualified by further charging, that if the Jury believe that McDougald and Cottinett paid the bank for said certificates, they were entitled to them.

Counsel for defendant also requested the Court to charge the Jury, that if they believed, from the evidence, that the certificates were placed in the hands of McDougald for the purpose of raising money on them for the bank, and he misapplied them by converting them to his own use, and thus improperly put them in circulation, that it was necessary that Darden should prove that he paid value received for them before he could recover; which charge the Court refused to give.

The Court was also requested to charge the Jury, that if they should believe that the certificates were passed by McDougald to Cottinett, in payment of a pre-existing debt, after having been delivered to him for the purpose of raising money for the bank, and thus put into circulation, improperly, plaintiffs could not recover on said certificates until he should prove that Cottinett paid value for them; and that if they believed that Darden obtained them of Cottinett after

dishonored, he could not, without such proof; which charge the Court refused to give.

To all of which charges and refusals to charge, as requested, the defendant's Counsel excepted.

Upon these several exceptions error has been assigned.

W. DOUGHERTY & H. HOLT, for plaintiffs in error.

JAS. JOHNSON & MOSES, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The only error, it seems to us, that was committed by the Court, relative to the continuance of the cause, was the construction put upon the Act of 1853–'4. The Court held that the defendant should state, in writing, *under oath*, what he expected to prove by the absent witness, before the plaintiff could be called upon to admit the truth of the facts expected to be established.

The Act reads thus: "No continuance shall be allowed in any case, in any of the Courts of this State, on account of absent witnesses, or for the purpose of procuring testimony, when the opposite party is willing to admit, and does not contest the truth of the facts expected to be proved; and it shall be the duty of the Court in which the case is tried, to order the proof so expected to be made, to be reduced to writing." (*Pamphlet Acts, p.* 52.)

The words of this Act are too plain to need interpretation. All that it requires of the party is, that he reduce his statement to writing. To rule, therefore, that in addition to that, he shall swear to it, is to add to the Statute. And the omission thus supplied by the Court, was not accidental; there was a good reason for it. By the rules of practice, when, on application for a continuance, the party made an affidavit of the facts which he expected to prove by the absent witness, the opposite party was not allowed to force a trial, by admitting the facts stated in such affidavit. (36*th Common Law Rule*, 2 *Kelly*, 473.)

Why not allow a trial to be forced, by admitting the facts

sworn to? The reason was, because the applicant would be tempted to commit perjury, by making oath that he expected to prove more than he really could; and thus obtain a continuance or force his adversary, by making an undue admission, to give him an unconscientious advantage. The Statute was passed to change this rule; and the Legislature having in mind the old practice, and the policy upon which it was predicated, determined to obviate the mischiefs of delay which it occasioned, and at the same time, not to hold out to the applicant any temptation to forswear himself. Hence, it intentionally dispenses with an affidavit, and requires only that the statement, as to what the party expects to prove, be reduced to writing. And upon this point we reverse the judgment of the Circuit Court.

[2.] Was the Court right in over-ruling the demurrer of defendant's Counsel, to plaintiffs' writ?

The objections to the declaration were two-fold—1st. Because the liability of the directors created by the 4th rule of the charter of the bank, was penal, and not remedial; and 2dly, That this liability was joint and not several; and that consequently, all of the directors ought to have been included in the suit, or a satisfactory reason assigned for the omission; as that the parties left out were beyond the jurisdiction of the Court, &c.

As to the first ground of demurrer, that the suit should have been for the excess, and that this provision of the Statute was penal; and that any creditor of the corporation, even for five dollars, was entitled to recover the whole amount of excess, leaving the rest remediless, as to this particular security, we cannot, for a moment, yield our assent to such a construction. And we consider the case of *Neal against Moultrie et al.* (12 *Ga. Rep.* 104,) a full adjudication of the point to the contrary.

The Legislature were anxious to protect the community against the evils of over-banking, and an irredeemable currency. And to effect that object, they restricted the issue of bills to three times the amount of specie actually paid in;

hat being considered, from experience, the proper relation hich paper should bear to specie—the basis of all legitimate anking. In the next place, not only the corporation, itself, as bound, but the directors were made liable in their indiidual and private capacities, to *any* creditor, for transcendng this ratio, of three to one. And in the last place, they llowed the bill-holder, in common with every other creditor, o resort, not only to the corporation and to this recourse against he directors, but they gave him, in favor of the circulating iedium, over every other class of creditors, the additional ight, to hold the persons and property of the stockholders ledged and bound for the ultimate redemption of the bills of he bank.

This construction, and none other, will carry out the meanng and policy of the law. If support were wanting to susain the previous decision of this Court upon this point, the rgument of Mr. Moses, who never fails to lighten by *en*ghtening the labors of this Court, is nothing short of demonration.

The second ground of demurrer, is as to the non-joinder of he co-directors. This suit is brought upon two certificates f deposit made by the bank, of which the defendant was a irector, and while he was a director; and they constitute a art of an excess created by the administration of the board f which he was a member, and for which he was personally able. These certificates were issued by the cashier, Matiew Robertson, and regularly entered on the books of the ank; the director sued being absent, at the time, at the ity of New York, attending to the business of the bank.

Did the charter mean to give a separate action against any ne of the directors; and is that according to its spirit and tent?

The 4th part of the 6th section of the charter under which is action was brought, is in these words:

"The total amount of debts which the said corporation hall at any time owe, whether by bond, bill, note or other ecurity, shall not exceed three times the amount of their

capital stock actually paid in, over and above the amount of specie actually deposited in the vaults for safe-keeping. In case of excess, the directors under whose administration it shall happen, shall be liable for the same, in their private and individual capacities, and may be sued for the same in any Court of record in the United States, by any creditor of the corporation, any condition, covenant or agreement to the contrary, notwithstanding; but it shall not be so construed as to exempt the said corporation, or the lands, tenements, goods and chattles of the same from being liable for and chargeable with the said excess." (*Prince*, 127.)

In the first place, we say, that the language of the Statute is in the plural—"the *directors*" shall be liable, &c. It is said that this is not to determine that the action shall be joint, but that it designates a *class* that shall be liable for the excess; as it speaks of the stockholders as a class who shall be liable for the *bills*. But the analogy fails in this: the stockholders are jointly liable in Equity, and would be at Law, but for the fact that different judgments would be recovered against each, in proportion to his stock. And for this cause, only a joint action, at Law, cannot be brought against the stockholders. The words of the Act would justify, and seem to require it, but the remedy is impracticable, for the reason just given. But no such difficulty lies in the way of a joint suit against the directors. The same verdict and judgment would be rendered against all the defendants.

But it is said, that the directors are not made liable, in their private *capacity*, but in their private and *individual capacities*. And it is asked, why is the word *individual* superadded, if not to show separate—single; and why is *capacities* used instead of *capacity*, but to show that the Legislature had in its mind the separate capacity of each director?

I am never satisfied, when the rights of persons are made to depend upon this sort of verbal nicety and critical dissection of a Statute. The Acts of our General Assembly are frequently drawn by laymen instead of lawyers; and to apply the legal acumen of *Dwarris* and *Saunders* to their in-

erpretation, is a very uncertain method of arriving at their rue meaning. It was simply intended to annex a personal iability to the official delinquency of the directors.

In the parallel provision, in the Commercial Bank of Macon nd a dozen others, the Legislature declare that the directors hall be liable in their "individual, natural and private ca-acities," thus superadding the term *natural* to the phrase s it stands in the Planter's & Mechanic's Bank charter; still, hey did not suppose that all these words, together, gave the ight to sue any one of the directors separately; for it is dded, in every one of these charters, "and an action of debt ay, in such case, be brought against them or *any* of them, heir or *any* of their heirs, executors and administrators." *See Prince, Title Banks.*)

For the official misconduct of the board of this bank, in reating an excess, there is no escape—neither absence nor lissent from the proceedings; and it is a remarkable fact, oo much so to be fortuitous, that every charter which I have xamined, from that of the Bank of Augusta in 1810, to the Planter's & Mechanic's in 1836, whenever this personal lia-ility clause, as to the directors, has been introduced *and a eparate suit is given*, there is a way of escape provided for uch as did not participate in the tortious act. This coinci-lence, I repeat, is not accidental. Indeed, the reason is mani-est. Here are seven directors, one of whom was absent from he State when the illegal act was committed, and another lissented and entered his protest upon the minutes, leaving ive only liable to the creditors. But for the provision that *my* of the directors might be sued, the action must have been oint. The creditor would be compelled to include, in his rit, two defendants who were not in default, and who must e acquitted upon the proof at the trial. What, then, would ave become of the suit, which could only be joint, when two f the defendants were discharged? Under the law as it tood at the date of these charters, or at any rate, as admin-stered by the Courts, the action would have abated. Who

does not see the propriety, therefore, of allowing separate actions against one or more of the directors under such circumstances?

But no way of escape is afforded for any director, under any plea of pretence whatever, under the Planter's & Mechanic's Bank charter. The director may have been a thousand miles off in the service of the institution, as Banks was; still, if an excess of indebtedness be contracted, that excuse will not avail him. He may have been present, laboring to prevent the very abuse by his colleagues for which he is sued, and when the measure was carried over his head, and in despite of his opposition, he may not only have recorded his vote in the negative, but entered his solemn dissent upon the minutes of the board. The law will take no excuse. He was one of the board of directors, under whose administration the charter was violated—that fixes his liability. The bond demands the pound of flesh, and it must be paid.

I ask, under such a charter, is it not mete and proper for *all* the directors to be joined, seeing that all are responsible and no way of escape is provided for any?

Counsel contend earnestly for their construction, and insist, that in the present case it works well; that here the defendant was not only a director, but president of the bank; and consequently, the manager of its business—the executive head of the concern; that he was in New York for the purpose of raising means outside of the capital, on which to extend the issues of the bank, when he knew that such issues were illegal, and made himself and his co-directors personally liable.

Suppose this were true, and that this bloody legal picture is not over-colored nor the testimony misapprehended, and that, in this instance, the justice, wisdom and foresight of the Legislature, would be amply vindicated, by so construing the charter as to enable "the defrauded creditor to select from an innocent board of directors, who are all equally liable, the great architect of the wrong and ruin that has been thus boldly and recklessly perpetrated on the community."

Every medal has its reverse. Instead of selecting this particular defendant, steeped in guilt, as Counsel imagine and represent him to be, this same construction, it will be observed, would have entitled this plaintiff to have passed him by entirely, notwithstanding he had "fattened on the fruits of the evil he had scattered abroad," and have enforced his demand against any other innocent member of the board of directors. What, then, would have been thought of the "justice, wisdom and foresight" of the Legislature in passing such a law?

Again, it is asked, shall the rules of construction and the laws of pleading, be strained to shield this trustee of the stockholders and of the public, that the plaintiff may lose his debt entirely, and the bill-holders be turned from the directors to innocent stockholders, who confided to the direction, generally, but particularly to this defendant, the president of the bank, the due administration of their affairs?

Admit that the evidence warranted the assumption, that the stockholders, in the Planter's & Mechanic's Bank of *Columbus*, confided to *John Banks*, particularly, the management of their monetary affairs, how does the joinder of all the directors, instead of a suit against him alone, cause the plaintiff "to lose his debt entirely, and the bill-holders to be turned from the directors to the innocent stockholders?" We are at a loss to comprehend this logic; on the contrary, the very reverse of this result is true. Better for the creditor, and better the stockholders, that all seven should be sued, rather than one.

We feel no difficulty, then, in holding that, under the charter of this bank, an action cannot be brought against a single director, unless a sufficient averment is made, showing why the others are left out. The Legislature has not authorized a separate suit, as in most of the other bank charters, in each one of which provision is made for the innocent director to relieve himself from accountability; no such door is opened for the directors of this bank; they are all considered in *pari delicto*. In case of excess, the *directors*, (plural,)

under whose administration it shall happen, shall be liable for the same. But it is not added, as it is in the charters of the Bank of Augusta, Planter's & State Bank, Farmer's Bank of Chattahoochee, Commercial Bank of Macon, and Insurance Bank of Columbus; "and an action of debt in such case, may be brought against them, (the directors,) or *any* of them, their, or *any* of their heirs, executors or administrators," which, or similar words, were indispensably necessary for the purpose of giving a several action against each of the wrong-doers.

After what has already been said, we deem it scarcely necessary to add, that the defence set up, that Banks was absent at the time the debt sued on was contracted, and for some time prior and subsequent, is wholly unavailing. A Statute is a stubborn thing; we can neither add to nor take from it; and the very same course of reasoning by which we satisfied ourselves, that all the directors must be joined, establishes the further fact, that neither absence nor dissent constitutes any legal excuse for a director under this charter. This plea is expressly given where a separate action can be brought. But neither a separate action nor this defence are allowable under this charter. We concede that this is a stringent restriction; but, without it, the personal liability clause would be a mockery.

The decision of these questions disposes of many of the minor points.

[3.] This being a Statutory remedy, a party seeking the benefit of it must pursue it strictly. The non-joinder of all the directors may be taken advantage of at any time, and need not be pleaded on abatement. The plaintiff must make out his case under the law, and according to law. He must stand *rectus in curia.*

[4.] The 4th plea was unnecessary. The fifth was properly stricken. The Statute of Limitations of six months, applies only to a penalty; but this being a Statutory remedy, the cause of action was not barred under 20 years. The same reason justifies the striking out the 6th, 7th, 10th, 11th

and 12th pleas, they being all pleas to limitations of six months, and five and six years. The 8th plea is a duplicate of the 3d, and we have already decided that that was properly stricken out, the Act of incorporation not making the absence of the defendant from the State a good defence. The 9th plea is a duplicate of the 4th, which has already been disposed of.

I would remark, that plaintiffs' Counsel have correctly understood the decision of *Thornton and Lane*, (11 *Ga. R.* 500,) namely: that the individual liability of the directors and of the stockholders, under this charter, is not strictly a contract, although, from convenience, it is frequently called so; but it is an obligation, *quasi ex contractu*, which is imposed by operation of *mere law*. The State passes a law—the law of incorporation of the Planter's & Mechanic's Bank. This law, unlike public law, is binding upon no one until some one voluntarily assents to make it the rule of his conduct. The stockholders, in accepting the charter, and the directors, when elected, made it, for themselves, a rule of conduct. By the issue of more than three dollars to one, the directors committed an illegal—a tortious act, and made themselves personally liable to the plaintiff for a breach of duty, because he was a creditor of the corporation. And an action *quasi ex contractu* is raised in his favor against the directors. This is a Statute liability—it is *quasi ex contractu*—but it cannot be called, technically, a contract; it need not be proved as contracts between parties must be.

[5.] As to the next assignment of error, while we admit that the books of the bank are evidence, both for and against the corporation; still, it was competent to prove, by *parol*, independent facts, such as the division and distribution of the stock, and the issuing of $280 or $300.000 in bills. We deem it unnecessary to extend the argument upon this point.

[6.] As to the teller's settlement, we apprehend the rule to be this: When books are admitted in evidence, they are testimony before the Jury, as to all entries appertaining to the same transaction; still, the party offering them may se-

lect and read to the Jury such portions as answer the purpose for which they were introduced by him, leaving it to the opposite party to submit any other parts that he may see fit.

[7.] It is in proof, that Francis Cottinett was the owner of the certificates in litigation; that he came by them in the due course of trade and for a valuable consideration, and before they were dishonored; and that the demand, by the Notary, of payment, was made at his request; and that the paper was subsequently transferred to H. D. Darden, the plaintiff; therefore, if Cottinett's title to the certificates was good, Darden's was. And all requests made or charges given, contrary to the facts thus proven and uncontradicted, were either hypothetical or erroneous.

We consequently hold, that the Court was right in overruling the defendant's motion to non-suit the plaintiff, because no demand on the bank had been proven by one authorized to make it.

[8.] The Court charged the Jury, that if they believed that the bank, at the time of issuing these certificates, owed more than three times the amount of capital stock actually paid in *in specie*, the directors, at the time, were guilty of an excess, and therefore liable.

In order to charge the directors, it must be made appear that there was an excess, and that it happened during their administration, viz: that the total amount of debts which the corporation owed, exceeded three times the amount of capital stock actually paid in at that time, the charter requiring, not the whole amount of the capital stock to be *paid in specie*, but twenty-five per cent. thereof, or $250.000 only.

But how absurd the struggle over this and many other matters in this record, some of which we have intentionally overlooked, upon the maxim, *de minibus*. The defendant was a director of this bank, from its first organization, in 1837, to 1841, when these certificates were issued—*a capite ad calcem*. And what is the startling fact disclosed by the proof before us? Beginning with an issue of $52.000 on a specie basis of $199.88, and ending with an indebtedness of $766,-

544 26, on a specie capital, including capital stock paid in, and deposits of $1.855! Or a circulation of 375 to 1, instead of 3 to 1! And yet, about one half of the bill of exceptions is made up of a Sebastopol fight—mining and counter-mining—assaults and repulses—over the question, of whether or not there was an excess of indebtedness created under the administration of Col. Banks!

No. 38.—JAMES MATHIS, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

[1.] Where affidavits are presented for the purpose of impeaching the conduct of the Jury, and others are received in their vindication, and upon an examination of the whole testimony, the case be not made out against the Jury, the Court will not interfere with their verdict.

[2.] Though the testimony of a young and inexperienced witness, be not free from discrepancies, nor altogether satisfactory, yet, if there be about it, as a whole, such an air of truth as, in the opinion of the Court, may have authorized the Jury to credit the main fact stated, the Court will not interfere with a verdict rendered thereon.

Assault, &c. in Baker Superior Court. Tried before Judge PERKINS, May Term, 1855.

Mathis was indicted, tried, and convicted of an assault with intent to commit a rape upon a little girl under the age of consent.

A motion was made for a new trial upon several grounds, to only two of which was the attention of the Supreme Court called—

1st. That the Jury, after retiring, were corruptly tampered with, by James J. Keaton, who offered a bribe of $500, and

induced them, by threats, and other promises and means, to return a verdict of guilty.

2d. That one of the Jury, viz: Wm. Everett, was the father-in-law of the prosecutor, (who was the father of the little girl,) of which fact, defendant's counsel were ignorant.

In support of the first ground, were produced the affidavits of William Jordan, John Knight, Lewis F. Lanier and Thomas Hatcher, to the effect that Keaton went under the window of the Jury-room and told the Jury to "find him guilty or you will swear to a lie," and then offered to bet $500 to $100, that he would be convicted—that it was near enough for the Jury to hear what was said, and that the Jury immediately came down.

The State's Counsel, in rebuttal, offerred the affidavit of Wm. R. Swearingen and three others, that Keaton was drunk at the time, and was at some distance from the Jury-room; and they did not believe the Jury heard what he said; and that he did not say, "find him guilty," &c. as far as they heard; and that at the time this thing occurred, Thomas Hatcher and Lewis F. Lanier, they know, were imprisoned in jail, and they believe that John Knight was there also.

Also, the affidavits of Keaton, denying that he spoke to the Jury or in their hearing, as he believed, and denying the use of the words alleged by Hatcher and others. Also, the affidavit of five of the Jurors, purging the Jury from all knowledge of this matter. To these last affidavits being received, Counsel for Mathis objected.

The Court refused to grant a new trial, and this is the error assigned.

MORGAN, for plaintiff in error.

Sol. Gen. LYON, for the State.

By the Court.—STARNES, J. delivering the opinion.

The objection taken to the Juror, Everett, seems to have

en abandoned by the Counsel for the plaintiff in error, ery properly so, we think,) and therefore, we shall not re- ark upon it.

[1.] The first of the two grounds which were pressed upon ie attention of the Court, was that a new trial should have en granted, because, as was alleged by the plaintiff in error, ie Jury had been tampered with by James J. Keaton.

In connection with this, we have considered the objection the admission of the affidavits made by the five Jurors, and Keaton.

We are not prepared to say, that under the circumstances, ese affidavits were not proper evidence. But without taking em into view, we are of opinion that the showing which was disputed, did not make out the case upon this point, as in- ted on by the plaintiff in error. One only of the witnesses the plaintiff in error deposes as to any effort made by eaton to bribe the Jury. And that he misrepresented or as mistaken, is shown, we think, by the other two, who heard thing of any offer of five hundred dollars to the Jury, if ey would find the prisoner guilty. It is possible that the her might, in good faith, have mistaken or misconstrued hat he heard Keaton say as to five hundred dollars, and ding the prisoner guilty.

The other two affiants say, that Keaton went under the ndows of the Court-house, and said to the Jury, "Find him ilty, or you will swear to a lie," &c. and offered to bet five ndred dollars to one that they would find him guilty, &c. it the affidavits of Swearingen, Jeffries, Miller, and Bell ntradict and are opposed to these statements. These per- ns seem to have been in a better situation to hear and un- rstand what was said by Keaton, than the three witnesses ready referred to, who were looking out of the jail; and to e testimony of these witnesses no exception has been taken. cording to their statement, no such attempt was made by eaton to influence the Jury.

[2.] The next point is, that the verdict is contrary to, and without evidence.

The testimony of the little boy, in this case, is not entirely satisfactory. It is somewhat contradictory, and in it there are discrepancies. These, however, to some extent, may be accounted for by the inexperience of a child, and the sharp fire of cross-examination to which he was subjected. Taking the whole of his testimony together, there is a character of simple truth about its dirty and disagreeable detail, which may well have satisfied the Jury as to the main fact, viz: that there had been a brutal attempt, on the part of this prisoner, to have sexual intercourse with the little sister of the witness. And as she was a child of seven years, too young to give her consent to the act which was attempted by the prisoner, we think that if they were so satisfied, they very properly found him guilty.

Let the judgment be affirmed.

No. 39.—HENRY JACOBS, plaintiff in error, *vs.* JOSEPH POU, adm'r, &c. defendant in error.

[1.] A judgment of dismissal, by a Court of Ordinary, discharging an administrator, will relieve him from all liability on account of his administration, unless such judgment be impeached in that Court, for irregularity, or in the Superior Court, for fraud.

[2.] After the dismissal of an administrator, the Statute of Limitations commences to run in his favor, as against the claim of a distributee against him, the relation of trustee and *cestui que trust* having terminated between them.

In Equity, in Talbot Superior Court. Decision by Judge PERKINS, March Term, 1855.

In 1825, Seaborn Jacobs died, owning a small estate, and eaving a widow and two infant children. George M. .Gullett became the adm'r, and took possession of the estate. In 183–, letters dismissory were granted by the Ordinary of Talbot County, to the administrator. Gullett afterwards died, and Joseph Pou was appointed administrator of his estate. T. W. Moore was appointed guardian of Henry Jacobs, one of he minors, (the mother and one of the children being dead,) and as such, filed a bill for account against the administrator of Gullett. In 1847, Henry Jacobs arrived at age. The bill of the guardian continued pending till 1851, and was hen dismissed. In 1852, (but not within six months after he dismissal of the former bill,) Henry Jacobs, in his own right, filed a bill against Pou, as administrator, for an account, and alleged that the judgment granting letters of dismission, had been fradulently obtained by the said Gullett, by false representations made by him to the Ordinary, as to his having settled up and paid out said estate.

On the trial of this bill, it was proven by Mrs. McKenzie, 'that she was very confident that Mr. Gullett never paid over any portion of the estate or its proceeds to any person during his life-time—only the pittance of interest which he paid to the widow; and her reasons were, that Henry Jacobs lived with her the most of the time, from his father's death to the death of Gullett, and if there had been any money paid, he would have known it."

Mrs. McNeal swore: That in 1827 or 1828, George M. Gullett said he had $400 in his hands belonging to the heirs of Gullett, and gave Mrs. Jacobs a written statement, showing what was due to the heirs; that Mrs. Jacobs had that writing in 1836; that Gullett never paid, so far as she knew, out five dollars out of that sum, and that was for the schooling of Henry."

The Jury found a verdict for the complainant (some other evidence, as to other points, being before them.) On motion, the Court granted a new trial, on the ground that the verdict was contrary to the evidence and the law.

This decision is assigned as error.

THOMAS and DOWNING, for plaintiff in error.

L. B. SMITH; B. HILL, for defendant.

By the Court.—STARNES, J. delivering the opinion.

Two points present themselves to us, as clearly controlling this case.

[1.] The judgment of dismissal, by the Court of Ordinary, in such cases, must operate as a discharge from all liability on the part of the administrator, unless the same be impeached in that Court, for irregularity, or in the Superior Court, for fraud. The latter course has been adopted in this case; and the bill, accordingly, alleges that the dismissal was obtained by the fraudulent representations of Dr. Gullett, as administrator.

It is necessary that such an allegation should be sustained by proof—proof which should consist, not of inference from the fact, that payment had not been made, but of some wrongful act done by the administrator, the effect of which was to deceive and impose upon the Court, and thus fraudulently and improperly to obtain the judgment of dismissal. But for aught that appears in this evidence, it may have been the opinion and judgment of the Court, upon some showing in good faith made by the administrator, that he had fully settled.

Indeed, the proof is only negative. The two ladies who are witnesses, say that they never knew of any payment, and that Mrs. Jacobs had a memorandum acknowledging an indebtedness, made by Dr. Gullett, as late as the year 1836. This may be so, and still Dr. Gullett may have settled with the guardian, between the years 1827 and 1831.

It is proper that the judgment should stand as evidence of this, until there is some proof of fraudulent representations

made by Dr. Gullett, or other deceit practiced upon the Court. It is proper as a rule of security and repose.

[2.] In the next place, we are of opinion that the Statute of Limitations was a good plea in this case. It was shown, that the plaintiff in error was of age, (at the very latest,) in March, 1847. From that time, the Statute commenced to run against him. It would have been avoided by the suit previously commenced, if that bill had progressed to a successful issue; but that suit was dismissed in 1851, and another bill was not filed until more than six months had elapsed. There was, consequently, nothing to obstruct the operation of the Statute; and more than four years having elapsed from the time when the plaintiff came of age, before the filing of the last bill, his remedy upon the account was barred by the Statute.

The only reason which has been given, why this should not be so is, that the Statute does not run in favor of a trustee against his *cestui que trust*. This principle does not at all influence the case before us. This relation between these parties, was terminated by the dismissal of the administrator; and his possession, from that time, was adverse to the *cestui que trust*.

There was evidence, that a payment of five dollars was subsequently made by Dr. Gullett to Mrs. Jacobs, for the schooling of the plaintiff in error, but there was no evidence that this was made by him as a trustee for the plaintiff in error, nor could it have the effect of continuing that relation, after the judgment of dismissal.

Judgment affirmed.

No. 40.—SESSIONS, FAIRCLOTH, plaintiff in error, *vs.* BENJAMIN S. JORDAN, defendant in error.

[1.] A deed, in the name of A B, was proved, on the part of the plaintiff, by the testimony of the subscribing witnesses. Then the defendant offered A B as a witness to prove the deed a forgery. The plaintiff objected to the admission of A B's testimony, upon the ground that it was "incompetent" for the makers "to gainsay what the subscribing witnesses had sworn." The Court over-ruled the objection: *Held*, that the Court did right.

[2.] B makes a deed for a piece of land to C, and afterwards makes another deed for the same piece of land to T. The younger deed is duly recorded—the older not: *Held*, that T, the donee in the younger deed, is not estopped from the right to say that B had not conveyed the land to C, the donee in the older deed.

Ejectment, in Dougherty Superior Court. Tried before Judge PERKINS, May Term, 1855.

This was an action brought by plaintiffs in error, against defendant in error, for a lot of land, No. 316, in 2d dist. The land was drawn by one John H. Baugh, and granted to him 2d March, 1836. On 10th January, 1834, Baugh conveyed to Carmichael, and this deed was recorded in the proper office, 24th December, 1836. A regular chain brought the title down to plaintiffs. On 21st December, 1837, Baugh conveyed the same land to one Giles Tompkins, and his deed was recorded in the proper office, September 5th, 1838. A regular chain brought the title down to defendant. All the deeds "contained clauses of warranty, in full."

On the trial, plaintiff proved by witnesses the hand-writing of the witnesses and the maker of the deed from Baugh to Carmichael. Defendant offered Baugh's testimony to show that this deed was a forgery. The Court admitted the evidence, and plaintiff excepted.

Plaintiff's Counsel proposed to prove that defendant had *actual* notice of plaintiff's title and claim, before he purchased. The Court rejected this evidence, and plaintiff excepted.

The Court charged the Jury, that if the grant from the State had not issued at the time of the conveyance from Baugh to Carmichael, they must find for the defendant, unless there was evidence to show that the grant fees had been previously paid. To this decision, plaintiff's Counsel excepted.

On these exceptions error has been assigned.

E. H. PLATT, for plaintiff in error.

VASON & DAVIS; SULLIVAN, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Was it right in the Court to admit Baugh's testimony?

[1.] The admission of this testimony was objected to, on only one ground, viz: "that it was in evidence that the subscribing witnesses had an actual existence, they having proved the existence of the deed, and the maker was incompetent to gainsay what the subscribing witnesses had sworn." And this was not a sufficient ground. (*Busby vs. Greenslate*, 1 *Str.* 445. *Lowe vs. Jolliffe*, 1 *W. Bl.* 365. *Jordaine vs. Lashbrooke*, 7 *T. R.* 608. 1 *Ph. Ev.* 48. 1 *Green. Ev.* §384.)

Was the charge of the Court right?

The charge was, that if the grant from the State had not issued at the time of the conveyance to Carmichael, the Jury must find for the defendant, unless there was evidence to show that the grant fees had been previously paid.

Instead of being this, the charge should, as the plaintiff insisted, have been this: that if Baugh executed the deed to Carmichael, the act divested Baugh of all legal and equitable title to the land; and the subsequent payment of the grant fees and issuing of the grant, inured to the benefit of Carmichael and those holding under him.

In this case, both parties claimed under the same person, Baugh, the drawer of the land; the defendant claiming, by

virtue of a younger deed, from Baugh, but one duly recorded, and one made after the issuing of the grant to Baugh; the plaintiff, by an older deed from Baugh, but one not duly recorded, and one made before the issuing of the grant.

Now, the charge of the Court was, in effect, that the defendant, who claimed under the younger deed, was not estopped from the right to insist that Baugh, at the time when he made the older deed, under which the plaintiff claimed, had no legal title to the land. And in this charge, we think the Court was right.

The doctrine of estoppel by deed—the doctrine that the donee in the younger of two deeds for the same land, made by the same donor, is estopped from insisting that the land was not, by the older deed, conveyed to the donee in that deed, is in direct conflict with much of the law contained in our Registry Acts. In those Acts, is to be found this rule: that a younger deed, if duly recorded, is to take precedence of an older deed, if not duly recorded. This rule is to be found in the earliest of those Acts: that of 1755, and, also, in one of the latest of them: that of 1837. (*Cobb's Dig.* 159, 175.) This rule, as to the cases that fall within it, is in direct conflict with the aforesaid doctrine of estoppel. And what cases fall within it? Cases in which the donor of the land owned the land at the time when he made the first of the two deeds; how much more, then, in cases in which the donor did not, at that time, own the land, but had come to own it at the time when he made the second deed?

[2.] We think it clear, therefore, under these Statutes, that an older deed not duly recorded, cannot operate as an estoppel upon a younger deed duly recorded. (*See Doe vs. Roe—decided at Augusta in* 1855.)

In this case, the estoppel, if one existed, would, in order to be of any service to the party insisting upon it, have to operate not merely as an estoppel proper, i. e. as a thing which "stoppeth or closeth up" one's "mouth, to allege or plead the truth," (*Coke Litt.* 352, *a.*) but as an actual *conveyance* from the donor to the donee, of the interest in the land acquired

by the donor, after the making of the deed; for the party insisting upon the estoppel, is the *plaintiff* in the ejectment, and the plaintiff in ejectment cannot recover, unless he shows title in himself; and in this case, the plaintiff cannot show title in himself, unless the estoppel be treated as a conveyance, and, as such, be made to convey the title into him; for his deed cannot convey the title into him, because that was executed before the maker of it had, himself, acquired any legal title to convey.

Now, speaking for myself, I must say, that I do not see how estoppel can be permitted to become a *conveyance* of lands so as to serve as the foundation of an action for the lands, in the face of these words of the fourth section of the Statute of Frauds: "no action shall be brought," "whereby to charge any person, upon any" "contract or sale of lands, tenements or hereditaments, or any interest in or concerning them," "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party, to be charged therewith, or some other person thereunto by him, lawfully authorized."

Estoppel is a thing that is not in writing; and even suppose, in this case, that Baugh, at the time when he made the first of the two deeds, had verbally said to the donee, in that deed, "I have no title to this land, but I expect to get a title to it before long, and I now agree that this deed, which I have made to you, shall be an estoppel upon me, so as to prevent me, when I do get a title, from saying that the land is mine and not yours; and I further agree, that this estoppel shall be to you a conveyance to you of that title, as soon as I acquire the title." Is it not most clear, that upon this verbal agreement or promise of Baugh's, no action could be brought, "whereby, *to charge*" Baugh? But if the law be such, that a person cannot verbally make an agreement so as to render himself chargeable in a particular way, can it yet be said to be such, that it shall render him chargeable in that

very way, without the existence of so much even as a verbal agreement on his part, to be chargeable in that way?

It is also argued for the plaintiff in error, that even if the Court below was right in not telling the Jury that the land passed by estoppel from Baugh to Carmichael, the first of the two donees; yet, that the Court was wrong in not telling them that Baugh, by executing the deed to Carmichael, became a *trustee* of the land for Carmichael, and those claiming under him; and that if the deeds from Baugh to Carmichael, and from Carmichael to Dennard, were recorded before Jordan purchased from Baugh, the record of those deeds was notice to Jordon, and he "purchased, subject to the trust;" and that, as against him, there was, by these means, produced in the plaintiff, "*a complete equity*."

But it is not true, in the first place, that Baugh, by *executing the deed* to Carmichael, i. e. by conveying to Carmichael all the interest which, at time of the conveyance, he had in the land, became a *trustee* of the land for Carmichel? To be a trustee for another, one has to have the legal title in himself; and this he cannot have in himself, after he has conveyed it to another, as he does, when he conveys to another *all* his title. Baugh could not have become a trustee of this sort before the *grant* had been issued to him, if he could then.

And in the second place, the record, which has not been recorded in time, is not a legal notification of the existence of the deed to those who may, after the registry, take another deed.

The charge of the Court then was, as we think, right upon the facts of the case as they stood when the charge was made.

But the plaintiff complains that the facts of the case should, at that time, have been different, and would have been so, had not the Court improperly excluded some testimony, viz: the testimony of the Faircloths, Joshua and William, offered to prove that Jordan and Tompkins had, when they respectively

rchased the land, *actual* notice of the title of the plaintiff's ssors.

And for this complaint, the plaintiff relies upon the case of *Neal vs. Kerrs & Hope*, (4 *Ga. R.* 161.)

But that case was upon a money-rule against the Sheriffs; nd Courts sitting on such cases, consider themselves to e sitting as Courts of Equity; and this Court, in that case, nforce what they admit to be only an *equitable* title. *lb.* 166.)

But this case is on an action of ejectment—a sort of action n which a title, merely equitable, is not of any use.

Besides, the question, whether under the Registry Acts of his State, a younger deed duly recorded, is to be postponed o an older deed not duly recorded, but of which the younger eed had *actual* notice, is a question, the solution of which, is ose appropriate to a Court of Equity; a Court, that, be the ecision which way it may, has power, on a proper state of leadings, to compel the donee, in either deed, to make such a onveyance to the donee in the other, as shall leave it no nger doubtful, in which of the two donees is the full title.

I must say, too, that I cannot regard the case of *Neal vs. Kerrs & Hope*, as to me, a conclusive interpretation of the Registry Acts. The Act of 1755, closes its first section in these rods: "In failure of which, all such as are lawfully and egularly registered, as aforesaid, shall be deemed, taken and onstrued to be prior, and shall take place and be recovera- le in law, before any and every deed, conveyance or mort- age, which has not been lawfully registered as above—any w, custom or usage to the contrary, notwithstanding." It as not until 1837, that the case of a deed having "notice f a prior deed," was made an exception to this general rule, hich gives a preference to deeds duly registered, over all thers. Why was the exception put, expressly, in the Act f 1837, if it had already, impliedly, existed in similar acts? hese deeds were both made before the Act of 1837, and hat Act is not retroactive.

We see no sufficient reason to disturb the decisions of the Court below.

No. 41.—WILLIAM, (a slave) plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

[1.] For the *definition* of offences committed by slaves and free persons of color, recourse must be had to the Penal Code of 1833, and not to the Criminal Code of the Common Law.

Murder, in Muscogee Superior Court. Tried before Judge WORRELL, December Term, 1854.

Bill (a slave) was indicted for the murder of Cæsar, another slave. The evidence showed that both of them were employed about a livery stable in Columbus. Bill was just grown and smaller than Cæsar, who weighed 188 pounds. Bob, another slave, and Cæsar, had a scuffle, (the morning of the homicide,) and Bill "*devilled*" Cæsar about Bob's scratching his neck. The latter begged him to let him alone, and then got mad. They all went to carry horses to the trough to water. *Bill* had his hand in his pocket on his knife—dared Cæsar "to make a rifle towards him, and he would cut his heart out of him." Cæsar would not hit him, and then Bill said he would give him first lick; and see if Cæsar would "*mash him up.*" Bill left his horse, and went round and slapped Cæsar, with his hand, on the shoulder. Cæsar showed no fight. Bill then stabbed him. This was the substance of the testimony.

Counsel for defendant requested the Court to charge, "That if the Jury should believe that defendant believed that

he was without friends amongst the negroes at the stable, and that Cæsar and the balance of the negroes were associated to oppress and harrass him; and if, in this connection, Bill believed that it was the intention of Cæsar to "mash him up;" and if Bill acted on this belief, under these circumstances, without malice aforethought, then it was manslaughter and not murder." The Court refused so to charge, and defendant's Counsel excepted.

The Court charged the Jury, that the definition of manslaughter, as laid down in the Penal Code of 1833, was applicable in the trial of a slave or free person of color. To this charge defendant's Counsel excepted.

These are the only errors assigned.

McDOUGALD and JAMES JOHNSON, for plaintiff in error.

RAMSEY, representing Sol. Gen. BROWN, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] A reversal is claimed in this case, upon two grounds —1st. The refusal of the Court to charge as requested; and 2dly. In reading to the Jury the definitions of murder and manslaughter from the Penal Code of 1833, as the law of the case.

1. Counsel for the prisoner do not manifest much confidence in the first ground. It was dwelt on but slightly in the argument. We award to the able Counsel credit for his candor in this matter; a professional virtue for which he deserves commendation, in all of his efforts before this Court.

The Judge was requested to charge the Jury, that if they should believe that the accused felt that he was without friends among the negroes at the livery stable, and that Cæsar, the boy slain, and the rest of them, were combined to harass and oppress him; and in the prosecution of this hostile

or evil intent, it was the design of the deceased "to mash Bill up," (to use the cant phrase of the witness,) and that the prisoner acted upon this conviction and without malice aforethought, then his offence was manslaughter, and not murder.

Had the evidence authorized this charge, it would have constituted a good defence to the prosecution, at least so far as to mitigate the crime from murder to manslaughter; and that the state of circumstances assumed to be true, for the purposes of the charge, may have existed in point of fact, is not improbable. The disparity in the age, size and manhood of the parties, make it unlikely that the younger and weaker, should have commenced the assault in the manner in which Bill is represented by the testimony to have done, had there not been some lurking cause, not fully developed, goading him on. His expression, too, that he had long wanted to kill Bill, a damned rogue, and that he would not rest until he had done so, manifests some secret grief not disclosed by the proof.

But not one of the facts hypothetically put in the request, are to be found in the record. It is not shown that Bill had no friends among the hands at the stable. Neither did it appear that they had clubbed together to worry or otherwise maltreat him. There is not only the entire absence of all such evidence, but, on the contrary, the only teasing seems to have been by the defendant.

Bob and Cæsar had had a scuffle, or *tussle*, as they called it, the morning of the day on which the homicide was committed, in which Cæsar received a scratch on the neck. It bled, and Bill jeered him more than once upon the mishap. Indeed, the proof establishes, that from the commencement to the fatal termination of this unfortunate affair, Bill, by words as well as by acts, was the aggressor. Conscious that he was armed with a deadly weapon, he not only bantered Cæsar for a fight, but when he failed to provoke him, to bring on the rencontre, Bill stepped up to him, and putting his left hand on Cæsar's shoulder, he almost simultaneously, as Cæsar turned, plunged his knife into his breast.

We trust the reality is not so bad as the testimony makes it.

Upon this ground, we are clear that the judgment below should be affirmed.

2. The next and main ground is, whether the definition of murder and manslaughter, as contained in the Penal Code of 1833, is the law by which this slave should have been tried?

We concur with Counsel, that the Code of 1833, as well as those which preceded it, apply to free white citizens, and not to slaves, unless such parts thereof as are specially made so. Where shall we go, then, to get the definition of offences which may be committed in this State by slaves and free persons of color? None of the Statutes passed, specifying the crimes which may be committed by this portion of our population, give any definition of those crimes. Neither the Acts of 1811, 1816 or 1821, define the crimes of murder or manslaughter, when committed by a slave or free person of color.

It is maintained that we must resort to the Common Law for this purpose. Wherefore? The Criminal Code of the Common Law is no more applicable to slaves than the Penal Code of 1833. And our Adopting Statute of 1784, in introducing the Criminal Code of the Common Law into this State, was never supposed to have extended it to slaves. They were a class *sui generis*, and have always been so treated by our legislation. We commenced, in 1770, to make provision for slaves, and the Provincial Act of that year is exceedingly comprehensive. We have been adding to it ever since.

It is no doubt true, that both before and since the Adopting Statute, we resorted to the Common Law for the definition of offences committed by slaves; and this practice continued until we adopted a Penal Code of our own. From that time, the uniform practice has been, to look to the existing Code, for the time being, for our definitions. If the Penal Codes have superseded and repealed the Criminal Code of the Common Law for our white population, *in all respects*, it has effected the same for the blacks, so far as to change the definitions of offences which may be committed by them.

Such we believe to be the general understanding throughout the State; and no reason occurs to us, founded either in law or policy, why a different practice should be established; for we repel the imputation, that our's is a bloody Code, when compared with that of England. We hold the very reverse to be true, and hope to vindicate it from this reproach, originating in misconception, when some of our recent decisions are submitted to the profession and the public. Be this as it may, we cannot doubt but that we are correct in the conclusion at which we have arrived upon this important point.

In answer to the inquiry, whether or not perjury, forgery, counterfeiting, &c. as defined by our Code, may be committed by a slave or free person of color, we reply, unquestionably, they may be. In the Act of 1816, (*Prince*, 792,) after enumerating particular offences, will be found this general provision: "All other offences committed by a slave or free person of color, either against persons or property, or against another slave or person of color, shall be punished at the discretion of the Court before whom such slave or person of color shall be tried; such Court having in view the principles of humanity in passing sentence; and in no case shall the same extend to life or limb."

Suppose a negro had the intelligence to counterfeit bank bills—why may he not be punished, under this law, for the offence of counterfeiting, as defined in the Code? And so, if he commit perjury in testifying against another slave. We do not mean to say, that a slave, in Georgia, is capable of committing every crime contained in the Code. Most of them he may, and be punished, under the discretionary power vested in the Inferior Court, by the Act of 1816.

No. 42.—THOMAS A. BRANNON, plaintiff in error, *vs.* THE CENTRAL BANK, defendant in error.

[1.] Where a *rule nisi* had issued against a Sheriff, calling on him to make return of his actings and doings upon a *fi. fa.* which had been placed in his hands, and he makes his return thereto, without objecting that the terms of the rule are too uncertain, and issue is joined upon his return, which is submitted to a Jury, and a trial had thereon; still, without objection from the Sheriff on account of such uncertainty: *Held*, that after verdict, an objection on account of such alleged uncertainty, came too late.

[2.] It seems to be the usual method of procedure, first to require a return from the Sheriff of what he has done, when it is desired to move against him for supposed failure of duty, in enforcing a process which has been placed in his hands; and if he be found in default, he is called upon, then, to show cause why he should not be attached for a contempt. Still, if the *rule nisi*, when first taken, be so framed as to notify him, that an attachment for contempt will be moved against him, if, upon making his return, he should be found in default, it would seem that this is a sufficient compliance with the demands of substantial justice.

[3.] When there has been an omission to enter a *rule nisi* against the Sheriff upon the minutes, at the time it was taken, the same may be afterwards entered *nunc pro tunc*.

Rule, in Muscogee Superior Court. Decision by Judge WORRELL, December Term, 1854.

At November Adjourned Term of Muscogee Superior Court, 1849, a rule *nisi* was taken against Brannon, former Sheriff, to show cause why he should not pay over the amount due on the case stated, or the rule "be made absolute, and an attachment issue against him, as being in contempt of this Court." The case was stated as "a *fi. fa.* in Superior Court," without stating from what county, or the amount thereof. At December Term, 1854, a motion was made to arrest judgment on this rule *nisi*, because of uncertainty, in not specifying the county whence the *fi. fa.* issued, or the amount thereof. In the meantime, however, at the June Term, 1854, the Sheriff had made return to the rule, issue had been joined, and a verdict, found in favor of plaintiff.

The Court refused to arrest the judgment, and Brannon excepted.

The rule *nisi* never having been entered on the minutes, the Court ordered the same entered *nunc pro tunc*. To this order Brannon excepted.

The Court, on motion, granted an order absolute, and directed an attachment to be issued, committing the Sheriff, without bail or mainprize, until he purge himself of the contempt, by paying over the money. To this order Brannon excepted.

On these exceptions error is assigned.

JOHNSON & SLOAN, for plaintiff in error.

THOMAS and DOWNING, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] It is alleged, that the Court erred in over-ruling the motion to arrest final judgment against the Sheriff, on the two grounds—1. Because no rule *nisi* against him had been granted. 2. Because the paper purporting to be such, was uncertain and indefinite in its character.

1. The record before us shows that a rule *nisi* had issued. Perhaps not in the form which is most commonly adopted; but it is a rule calling on the Sheriff to make a return of his actings and doings upon the *fi. fa.* which is stated at the head of the rule; and in connection therewith, to show cause why he should not be attached for a contempt of Court.

2. It is true that the rule is not so certain in its terms as it might be made. But it seems to have been sufficiently certain, to have enabled the Sheriff to make his return thereto, without objection from him at the time. Issue was taken with that return by the plaintiff, a trial had thereon before a Jury, and verdict rendered without any such objection on the part of the Sheriff. After this, such an objection comes too late. And it must be presumed, that if the rule was not at first

sufficiently certain for all purposes of notice to the Sheriff, it was made so, to his satisfaction, at the trial.

[2.] It is next insisted, that the Court erred in making the rule absolute, and granting an attachment against the Sheriff, 1. Because the Sheriff should have been notified and required to show cause why he should not be punished for contempt, before the attachment issued. And to support this position, *Davis vs. Irwin*, (8. *Geo. R.* 156,) was cited.

In that case, the error alleged was, that "after the rule was made absolute against the Sheriff, an attachment was ordered to issue against him, without first calling on him to show cause why the attachment should not issue against him." This is the objection which the Court there says, "was well taken." But here the attachment was not ordered to issue, without first calling on the Sheriff to show cause why he should not be attached. He was called on by the rule *nisi* to make return of his actings and doings in the premises, and also to show cause why he should not be attached for a contempt. Thus, in effect, he was notified that an attachment would be moved against him, if it should appear that he had not done his duty, and had not paid what he had collected on the *fi. fa.*

We believe that it is the usual method of procedure, first, to require a return of what the Sheriff has done, when it is desired to move against him for supposed failure of duty in enforcing a process which has been placed in his hands for execution. And if he be found derelict, he is called on to show cause why the rule should not be made absolute and he should not be attached for a contempt. Still, if he do receive notification at the time the rule is first moved against him, that an attachment for contempt will be moved against him, if he should be found in default, is not the result, *in point of substantial justice*, the same to him?

It has been objected that the final rule, in this case, should not have been that the Sheriff do pay the money, but that he should have been attached for a contempt, if he were found in default of duty.

One construction of the rule which was taken, may be, that it was intended as a punishment for contempt, and that he should be imprisoned until he purged himself of such contempt, by paying the money found to be due. But that payment, itself, may be regarded as having been intended as a punishment for the contempt; and hence, the objection cannot be sustained.

[3.] The admission of the entry of the rule *nisi* upon the minutes, *nunc pro tunc*, was in accordance with a well settled and judicious practice; and we have no fault to find with it.

Judgment affirmed.

No. 43.—THOMAS B. HANCOCK, plaintiff in error, *vs.* CYRUS ROSS, defendant in error.

[1.] Where the terms of a special agreement have been performed on one side, and nothing is to be done on the other but to make a money payment, such payment may be enforced by *indebitatus assumpsit*.

[2.] Where goods have been supplied under a special agreement, but not in conformity thereto, compensation may, nevertheless, be enforced by action of *general assumpsit*, if the defendant has retained and enjoyed the benefit of what was actually furnished.

Assumpsit, &c. in Marion Superior Court. Tried before Judge WORRELL, February Term, 1855.

This was an action of assumpsit, by Hancock against Ross, for the price of a buggy and harness. At the trial, plaintiff proposed to prove, by A. D. Chambliss, that "defendant offered him, as agent for plaintiff, $155 for the buggy and harness, and witness agreed to take it if he could do no better. Afterwards, witness met him and told him he had brought him the buggy. Defendant said he had not the money; wit-

ness proposed to wait till Christmas, by paying interest; defendant said he had no way of giving the note; witness told him that he would leave the buggy at his house, and he could have the dash-board mended, and when witness came back he would take the note and pay for the mending. To this, defendant agreed."

To this testimony, Counsel for defendant objected, on the ground, that it disclosed a special contract, and did not support the action. The Court sustained the objection, and this decision is assigned as error.

BLANDFORD; OLIVER, for plaintiff in error.

PRYOR, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] The rule, that where there is an express contract between the parties, they cannot resort to an implied one, is so clear, and has prevailed so long, that it is said to have been reduced to an axiom of law.

But it is also very well settled, that where the terms of the special agreement have been performed on one side, and nothing is to be done on the other but make a money payment, such payment may be enforced by *indebitatus assumpsit.* (*Cooke vs. Munstone*, 1 *B. & P.* 354, *B. N. P.* 139. *Alcorne vs. Westerbrooke*, 1 *Wils.* 117. *Bianchi vs. Nash*, 1 *M. & W.* 545. See, also, notes to *Cutter vs. Powell*, 2 *Smith's L. C.* 1. *Clark vs. Fairchild*, 22 *Wend.* 517. *Bank of Columb. vs. Patterson*, 7 *Cranch* 299.)

Let us apply these principles to the case before us. There was an express agreement between the parties; and it appears, that all that was for the advantage of the defendant, which the plaintiff, by his agent, had undertaken to perform, was performed by him. He agreed to deliver the buggy for the price stipulated, and to call afterwards and pay the person whom the defendant might get to mend the dash-board,

and to receive a note for the purchase money. It is true that the record does not show that any payment was ever made by the plaintiff for the mending of the buggy, or that he ever called for the note. But it does not appear that this was made a *condition precedent* in the agreement. If the plaintiff has not paid for mending the buggy, he is liable for it, and it may be collected from him, and the defendant need not necessarily have paid for the same, or have made himself liable therefor. If he did not call for the note, no one has suffered injury by it but himself; so that these things were not conditions precedent to the defendant's deriving the advantage to himself, which was contemplated in the execution of the contract. The money payment, therefore, which he agreed to make, may be collected from him by this action, which is in the nature of an action of assumpsit, and the rate of recompense, viz: the price of the buggy which was fixed by the special contract, may be looked to as the measure of damages; not that the plaintiff can ground his claim, when his action is in general assumpsit, upon the special agreement, but that such agreement may be taken as *evidence* of value.

[2.] There is another reason why this action may be sustained, notwithstanding the special agreement, and although the plaintiff may not have strictly complied with his part of the contract: and that is, that according to this record, the defendant appears to have retained the buggy, and enjoyed the benefit of the contract to a certain extent, and without repudiating it. In such cases, an action of *indebitatus assumpsit* will lie, even where there has been a special contract. (*Farnsworth vs. Garrard*, 1 *Camp.* 38. *Park, J. in Read vs. Rann. Hayward vs. Leonard*, 7 *Pick.* 181. *Linningdale vs. Livingston*, 10 *Johns.* 86.) And see other cases, cited at 2 *Smith's L. Cases*, 25.

Judgment reversed.

No. 44.—DAVID N. BURKHALTER, plaintiff in error, *vs.* WILLIAM WELLS *et al.* defendants in error.

[1.] Where the verdict of the Jury is strongly and decidedly against the weight of evidence, a new trial will be granted.

Motion for new trial, in Marion Superior Court, February Term, 1855. Decided by Judge WORRELL.

This was a claim case. The levy was under a mortgage *fi. fa.* issued on a mortgage made by defendant in *fi. fa.* to William Wells and Burton W. Dowd, dated 2d November, 1840, and on which was entered, "Recorded in book E, 2d February, 1841. B. W. Dowd, Clerk." The claimants were purchasers under younger judgments. The whole issue in the case was, whether the mortgage was properly recorded, and within time.

JOHN CAMPBELL'S evidence agreed upon was, that being informed that there was a defect in the registry of the mortgage, he went into the office and examined the record. It was all perfect, except the name of the mortgagor did not appear to the deed. He thinks Burkhalter knew of the defect before he purchased. Afterwards, he looked again at the record and found it complete. He asked Dowd how it happened. He at first evaded, and then admitted, that he had added the name himself, and said he had a right to do it.

WILEY WILLIAMS testified: That he heard Dowd say, that in recording the mortgage, he had neglected to put the signature; that he afterwards added it, but not within the time allowed for the record of the mortgage.

The original deed of mortgage was lost.

B. HILL, testified: That he had seen the original mortgage deed, and that it had the same entry of "recorded," &c. on it; that he afterwards examined the registry, and found it complete.

W. C. DOWD, testified: That he was the son of B. W. Dowd, and used to aid him in his office of Clerk; that ac-

cording to the best of his recollection, the copy of the mortgage was correct; that he knew of the recording of the original; he recorded it himself, for his father. It appears to witness that there was some error in the subscription of the name of B. W. Dowd, Clerk, to the certificate of record; but of that he is not positive. The omission, he thinks, was of the W, in the name of Burton W. Dowd, Clerk.

The Jury found a verdict for plaintiffs in *fi. fa.* A new trial was moved, on the ground that the verdict was against the evidence and weight of evidence. The Court refused the rule, and this is the error assigned.

BLANDFORD; HALL, for plaintiff in error.

HAWKINS, representing COOK & MONTFORT, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] If Campbell and Williams are to be believed, and no attempt is made to impeach their testimony, then a new trial should have been granted in this case, upon the ground, that the verdict of the Jury is strongly and decidedly against the weight of evidence.

No. 45.—JOB TURNER, plaintiff in error, *vs.* JOHN JOINER *et al.* defendants in error.

[1.] In a proceeding under the sixth section of the Judiciary Act of 1799, to establish a lost Sheriff's deed to property sold under *fi. fa.* the defendant in *fi. fa.* is a necessary party.

[2.] The Court in which a lost deed for land is to be established, is the Superior Court of the county in which the land lies.

Ejectment, in Marion Superior Court. Tried before Judge WORRELL, February Term, 1855.

This action was for land on the demise of John Joiner and others *vs.* Job Turner, tenant in possession. On the trial, Turner offered in evidence an established copy of a Sheriff's deed—established by the Superior Court of Marion County—the deed being made by Cullen R. Lockett, former Sheriff. The rule *nisi* was served upon him, and the Court permitted the plaintiff below to show that Lockett did not reside in Marion County, at the time of the establishment of the copy deed. Upon this proof, the Court rejected the established copy; and the admission of evidence to this point, the trial of the issue by the Court, and the final rejection of the copy deed, are all assigned as errors in this Court.

BLANDFORD & CRAWFORD; MILLER & HALL, for plaintiff in error.

ELAM, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

What persons ought to be the parties to a rule, for the establishment of a lost Sheriff's deed?

What Court is the Court to entertain the rule?

The answer to these two questions will decide this case.

The latter part of the sixth section of the Judiciary Act of 1799, is as follows: "and the said Courts, respectively, shall have power and authority to establish copies of lost papers, deeds or other writings, under such rules and precautions as are or may have been customary, and according to law and equity."

The rules and precautions that had been customary, and according to law and equity, for affording relief in the case

of lost writings, were such as were in use for that purpose in Equity. And among those in use in Equity, for that purpose, as well as for all other purposes, was one, that all persons interested in the relief prayed for in the bill, should be parties to the bill.

Who, then, are the persons interested in the question, whether a Sheriff's deed shall be established or not?

Of these persons, he who, as Sheriff, made the deed, is obviously one. It is clear that he may be affected in various ways, by the judgment establishing the deed.

The defendant in the *fi. fa.* under which the property was sold, is another. It is against him, chiefly, that the deed, when established is to operate.

Is such a deed necessary to transfer the property to the purchaser? It is the property of the defendant in *fi. fa.* that the deed is so to transfer. Is such a deed not necessary to the transfer of the property, but yet useful to the purchaser, as evidence, to show the property transferred to him? Whatever, as evidence, shows the property transferred *to* the purchaser, as evidence, also shows it transferred *from* the defendant in *fi. fa.* In these respects, most important respects, too, it is the defendant in *fi. fa.* and not the Sheriff, who has the interest that is against the establishment of the deed.

[1.] In a proceeding in Equity, to obtain relief or protection against the consequences of the loss of a Sheriff's deed, the defendant in the *fi. fa.* whose property the deed would transfer or effect, would be a necessary party. Of this, there cannot be much doubt. And if, in such a proceeding, he would be a necessary party, then, by the language of the sixth section of the Judiciary Act of 1799, he is a necessary party to a proceeding under that section, to establish a lost Sheriff's deed.

This being so, the Sheriff's deed, in this case, was not properly established—for Jones, the defendant in the *fi. fa.* was not a party to the rule by which the deed was established. For *this* reason, therefore, the decision of the Court, rejecting the copy deed, when offered as evidence, was right.

In what Court, of what county, is the proceeding for the establishment of a lost deed to land to be? In the Superior Court of the county in which the land lies.

The Constitution of the State says, that "The Superior Court shall have exclusive jurisdiction," "in all cases respecting titles to land, which shall be tried in the county where the land lies."

A case for establishing a lost deed to land, is a case respecting the title to land. It is, therefore, a case which, by the words of the Constitution, has to be tried in the Superior Court of the county in which the land lies. Such a case more directly and exclusively respects the title to land, than does a case in ejectment; for strictly speaking, an ejectment concerns rather the possession of land than title to land.

[2.] We think, therefore, that the Superior Court of the county in which the land lies, is the Court in which a lost deed to the land is to be established.

There were some other points in the case, but the decision of these two renders it unnecessary to decide them.

No. 46.—DAVID N. BURKHALTER, plaintiff in error, vs. CORDY BULLOCK, defendant in error.

[1.] Appeals are included within the Act of 1818, as to amendments and special pleadings.

Motion, in Marion Superior Court. Decision by Judge WORRELL, February Term, 1855.

Burkhalter recovered a judgment against Bulloch, from which Bulloch appealed, paying costs and giving security. At the first term of the appeal, a motion was made to dismiss

the same, on the ground that the security was insufficient; and that if ever sufficient, it had become insufficient pending the appeal. Issue was joined on these grounds by Bullock, and found against him. Bullock then proposed to file his affidavit, that from his poverty he was then unable to pay the costs and give the security, in terms of the law.

The Court admitted this affidavit, and refused to dismiss the appeal; and these decisions are assigned as error.

BLANDFORD and S. HALL, for plaintiff in error.

PRYOR, for defendant.

By the Court.—BENNING, J. delivering the opinion.

In this case, the motion of the appellee, Burkhalter, was to dismiss the appeal on one or the other of two grounds, viz: that the sureties of Bullock, the appellant, were insolvent at the time when the appeal was entered, or that they had become insolvent since the appeal was entered. "And therefore," says the bill of exceptions, "said Bullock joined issue upon said motion, as to the solvency of said securities, at the time said appeal was entered, or as to the solvency or insolvency of said securities, pending said appeal, which issue was then and there submitted to a Jury," "by said Court;" and "the said Jury returned a verdict, finding the issue in favor of said Burkhalter."

Now, what was it that the Jury found? That the sureties were insolvent when the appeal was entered, or that, though solvent then, they became insolvent afterwards? It is impossible to say.

And, unless this could be known, it is not possible to determine what further ought to be done in the case; for the consequences of a finding, either way, on the first alternative of the issue, would be different from those of a finding, either way, on the last alternative of the issue.

We think, therefore, that it was wrong in the Court, to receive this finding; and, therefore, we think that this issue

ught to be submitted to another Jury, with instructions to nd on each alternative of the issue.

When this shall have been done, should the finding be, that he sureties were insolvent at the time when the appeal was ntered, then, still, we think the appeal is not to be dismissed, the appellant will make affidavit that he is advised, and beieves that he has a good cause of appeal, and that, owing to is poverty, he was unable, at the time of the appeal, to give etter security than that which he gave.

And should the finding be, that the sureties became insolent after the appeal was entered, neither, then, do we think hat the appeal is to be dismissed, provided the appellant will ake affidavit that he is, at the time when he makes the affiavit, advised and believes that he has a good cause of apeal; and that, owing to his proverty, he is unable to give any urther security on the appeal, than that which he has aleady given.

[1.] In the opinion of this Court, the Act of 1818, as to mendments, includes appeals. And the first section of that Act is in these words: "That, in every case where there is good and legal cause of action, plainly and distinctly set orth in the petition, and there is, in substance, a copy served n the defendant or defendants, or left at their most notorious place of abode, every other objection shall be, on motion, mended without delay or additional costs." (*Cobb's Dig.* 87. *See* 15 *Ga. R.* 110.)

And if an affidavit shall be made by the appellant, in purnance of what has above been indicated, he will have brought himself within the Act of 1842, to enable parties to ppeal without giving security and paying costs. (*Cobb's Dig.* 01.)

I doubt, myself, whether any objection can be taken to an ppeal, on the ground that the sureties have become insolvent since the entering of the appeal. In such a case, the appeal is certainly good at first; and does the Statute of Appeals require more than that? I doubt it, notwithstanding the rule of Court.

No. 47.—OSBORNE EDWARDS, plaintiff in error, *vs.* JAMES PERRYMAN, trustee *et al.* defendants in error. JAMES PERRYMAN *et al.* plaintiffs in error, *vs.* OSBORNE EDWARDS, defendant in error.

[1.] If the answer does not not clearly set forth such facts as, displacing the whole equity of the bill, require an injunction to be dissolved; but only swear off a portion thereof, the injunction may be dissolved *pro tanto*.

[2.] Where a bill in Equity is filed by a trustee, under a deed of settlement, in favor of L C E, a married woman, and also, in the name of the latter, by *prochein ami*, against her husband, who is the maker of the deed, she being the chief beneficiary under the same, most interested in the disposition of the property, and the decree which is sought; and the suit is dismissed by the trustee, without the consent of the wife or her Solicitor: upon motion to re-instate the same: *Held*, that L C E had the right to be consulted as to the dismissal of the bill, and that no act of the trustee, in dismissing the same without her consent, could be suffered to prejudice her rights.

In Equity, in Marion Superior Court. Decisions by Judge WORRELL, February Term, 1855. Consolidated, by consent, in the Supreme Court.

On 12th April, 1854, Osborne Edwards executed a deed of trust to James Perryman, conveying certain lands, negroes, and three promissory notes—one on H. M. Jeter, one on H. K. Lamb, and one on Wm. Yarborough—to hold the same for the sole and separate use of the wife of Osborne Edwards for life—reserving the management and control of the property, both real and personal, to Osborne Edwards, by and with the consent of his wife, and also the power to sell and reinvest in the same way. Subsequently, Perryman, as trustee, and Porter Ingram, as next friend of Mrs. Edwards, filed their bill against Osborne Edwards, Henry M. Jeter and others, alleging the execution and contents of this deed, and that Edwards was a man of dissolute habits, frequently in a state of beastly intoxication, and wholly unfitted for the management of any business, associating with persons of low character, and losing considerable sums by gambling; that he had

raded the notes on H. M. Jeter and Lamb, to one Samuel H. Crawford and one Davis, with intent to defraud Mrs. Edwards, they knowing the existence of the deed, that he made no provisions for the support of his wife, and failed to re-invest the proceeds of the said notes, and is using and wasting the rents, issues and profits of all the property, real and personal. Mrs. Crawford, in this bill, alleged that she withdrew her consent to the said Osborne's continuing to manage and control this property, and required him to turn it over to her trustee. The prayer was for a receiver, and that Edwards be decreed to deliver up all of said property into the receiver's hands. Also, for an injunction, restraining Crawford and Davis from trading or collecting the notes purchased by them, and restraining the makers of the notes from paying the same. All of which was granted.

Edwards, by his answer, admitted the making of the deed, but set up that it was procured from him fraudulently, when he was intoxicated; admitted excessive drinking, but attributed it to the abandonment of his wife; admitted gaming for cigars, cider and spirituous liquors, but denied gaming to any considerable amount. As to the note on Jeter, he stated he had placed it in the hands of Messrs. Blandford & Crawford, Attorneys, to collect and pay over, from the proceeds thereof, enough to satisfy a note to Sam'l Crawford, due by Edwards, before the making of the pretended deed. The alleged sale of the note to Davis was denied. He admitted that he had not paid anything towards the support of Mrs. Edwards, but alleged that he never had been applied to for any amount for that purpose.

The answers of Crawford and Davis agreed with Edwards, as to the facts within their knowledge.

On motion of Counsel for Crawford, on the coming in of his answer, the Court ordered the injunction dissolved, so far as it restrained Crawford and his Attorneys from collecting the note on Jeter. This is the decision to which the complainants excepted.

During the vacation, James Perryman, the trustee, ordered

the Clerk to dismiss this bill, and it was so entered on the docket by the Clerk. At the February Term, the Counsel for Mrs. Edwards and her next friend, moved a rule *nisi* for defendants to show cause why the bill should not be re-instated, on the ground that Perryman was a dry trustee, and Mrs. Edwards, the true beneficiary and party; and that she had neither consented to or known of his action in this matter. The defendants responded, that Perryman had agreed with Edwards, that if Edwards would turn over to him the notes for hire and rent, he would dismiss the bill; that he did deliver the notes as agreed on, and Perryman dismissed the bill; and that this was a full and complete settlement of the case.

On the hearing, it appeared that Mrs. Edwards employed the Counsel to file the bill, the trustee declining to do so; and that he was merely a nominal party. The Court re-instated the case, and to this decision Edwards excepted.

The errors assigned by each party, were heard together.

BLANDFORD & CRAWFORD, for Edwards.

OLIVER; HALL, for Perryman *et al.*

By the Court.—STARNES, J. delivering the opinion.

[1.] The order of the Court below, dissolving the injunction as to Crawford, on the ground that the equity of the bill was sworn off, was too general. We think it right that the injunction should have been dissolved, (according to the case made by the answer,) to the extent of the debts of Edwards, shown to have been in existence at the date of the deed executed by him. And that the Court should have modified his order so that Crawford might have proceeded to collect the note in his hands, if he chose to take the risk of this, with the bill pending, and have paid such debts, holding the balance subject to further decree. But the answer does not show whether or not these debts would have absorbed the fund in question. If they would not, it is proper that the

balance of the note in Crawford's hands, after these debts were paid, should be held, by him subject to be paid over to the purposes of the trust. The Chancellor should have given the case direction accordingly. To the extent indicated, therefore, we reverse the judgment dissolving the injunction.

[2.] This record shows that the bill was filed "at the instance and request of Mrs. Edwards, and for the protection of her rights in the property;" that the Counsel who filed the same was employed by Mr. Perryman, the latter stating that he did so for the benefit of Mrs. Edwards; that she was to pay the fee, &c. and that it was dismissed in vacation by Perryman, without the knowledge or consent of Mrs. Edwards or her said Counsel, and against her wishes. The record further shows, that Mrs. Edwards was the person chiefly interested as complainant in the suit, and who would be most affected by a disposition of the property sued for.

The deed had conveyed the property *for the sole and separate use and benefit of Mrs. Edwards during her life, her husband being allowed the management and control thereof, with her consent*, the issue and proceeds to be applied to their joint support—the surplus to be applied by the husband, as trustee, to the purchase of other property, with consent of the wife, and with power in the husband, with consent of the wife, to change the property. And the right of survivorship was secured to the husband and wife, respectively. Provision was also made, by the deed, for a change of the trustee, by the joint action of the husband and wife, at their pleasure.

Now the bill, in the name of the trustee, Perryman, and of Mrs. Edwards, by *prochein ami*, sets forth the waste of the property by Edwards, the husband, declares his incapacity, by reason of bad habits, to manage the same properly, and prays that it may be taken from him and placed in the hands of a receiver, or of the trustee, Perryman, until the further decree of the Court; and that such receiver or trustee should be required to give bond and security that he would faithfully execute the trust.

Its purpose has not been served, therefore, by the delivery up of the property to the trustee, as has been argued. That trustee, himself, should be required, if he is to retain possession of the same, to give security for its faithful management, according to the prayer of the bill, and a decree may be needed to adjust the rights of the parties under this change of circumstances. Edwards, the husband, by the deed, was allowed the management of the property, the right to invest any surplus thereof, and to change any portion of the investment, with the consent of the wife. Now that the property is taken from him, who is to execute these provisions of the deed? How can this power be transferred to the trustee, without a decree to this effect?

It is plain that all this can be determined and settled only by a decree of the Chancellor. And therefore, the purposes of the bill have not been served. If not, as Mrs. Edwards is the chief beneficiary under the deed—is the person most interested in the disposition of the property, and in the decree to be made, she had the right to be consulted as to the dismissal of the bill, and she and her Solicitor should have had an influence in giving direction to it. No act of the trustee should be allowed to prejudice her rights. (*Batts vs. Strutt*, 1 *Hare*, 146. *Parker vs. White*, 11 *Ves.* 226. *Hill on Tr.* 316, 317.)

It only remains to add, that what has been said authorizes the conclusion, that the bill was properly re-instated in the Court below.

No. 48.—ISAAC HART and another, adm'rs, plaintiffs in error, *vs.* SAMUEL HOLLY and another, defendants in error.

[1.] Under the Act of 1847, to simplify pleadings, an action was brought on a note which had been due more than six years, but which had on it, se-

veral credits; and among them, a credit made within six years, next before the commencement of the suit, but not within six years, next after the making of any other of the credits, or within six years, next after the maturity of the note: *Held*, that the action might well be brought under the Act.

Suit on note, in Marion Superior Court. Tried before Judge WORRELL, February Term, 1855.

This was an action brought under the Act of 1847, "to simplify and curtail pleadings at law." It was upon a note for $233 33, dated July 12th, 1838, and due 25th December next thereafter. There were, on the note, several receipts, dated, respectively, 2d February, 1839, May 7th, 1839, June 4th, 1839, January 13th, 1840, and February 5th, 1853.

The Court below decided that the plaintiffs could not recover in this form of action, upon this note; and this is the error assigned in this case.

Another point was made but not decided in this Court.

BLANDFORD; HALL, for plaintiff in error.

SMITH & POU; B. HILL, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] The action in this case, was in the form authorized by the third section of the Act of 1847, "to simplify and curtail pleadings at law"—a section which is in these words: "The form of an action to recover money on a note, bill, bond, receipt, or written promise of any description, by adding a copy of which, with the endorsers names (if any) and credits, shall be appended," &c. "may be as follows, to wit:" (the form adopted in this case.)

One of the credits on the note was dated in 1853; a date which was within less than six years, next before the commencement of the suit, but not within six years, next after

any one of the other credits, or next after the maturity of the note.

This credit was in the following words: "Received on the within note, fifty dollars, February 5th, 1853."

The Court below dismissed the action, considering it not to have been authorized by the Statute.

Was that decision right?

The words, "written promise of any description," which are employed in the Statute, include writings in which there is a promise understood, as well as writings in which there is a promise expressed. Unless the words do this, they do not include any indorsement; for, in general, no indorsement contains more than an understood promise. And it is certain, that it was not the intention to exclude, altogether, from the Statute, understood promises; for the Statute mentions bills and receipts, by name, and these are but the signs of understood promises.

Taking, then, these words in the Statute, to extend to writings in which the promise, although not expressed, is understood, is the credit aforesaid such a writing?

That credit was, it is to be presumed, as the case stands, entered with the assent of the maker of the note. The motion of the defendant, to dismiss the case for insufficiency in the declaration, admitted the truth of the statements contained in the declaration. And among those statements was that of this credit.

But if the credit was entered with the assent of the maker of the note, the credit is a writing from which is to be implied a promise, on the part of the maker, to pay the balance due on the note. That this is true, has been determined by a vast number of decisions.

It seems, then, that this credit is within the Statute—within the *reason and spirit* of the Statute.

It is, also, in form, it may be remarked, within the very *words* of the Statute: for it is, in form, a receipt; and receipts make one of the classes of writings enumerated by name, in the Statute.

The action, therefore, in this form, might well be brought under the Statute.

And in this conclusion, there is nothing at variance with the decision in *Van Buren vs. Webster*, (12 *Ga. R.*) for in that case there was no writing at all. The promise relied on, was a verbal one.

These, I think, are the reasons which lead a majority of the Court to conclude that this action was well brought in the form authorized by the Act of 1847, and, therefore, that it should not have been dismissed by the Court below.

I, too, come to the same conclusion, but for different reasons. In my opinion, it is the old promise, and not the new, which, in cases of this kind, has to be the foundation for the suit. If there is one single English decision in favor of the position, that the new promise can, in such cases, be the cause of action, I have never seen it. If there is a single English form, in any book of forms of pleading for a suit on a new promise, as the cause of action, I have never seen it. In *Hyleing vs. Hastings*, (1 *Ld. Ray.* 389, 421,) it is said, that '*Holt* C. J. reported to the King's Bench, that he had put his case to all the Judges of England, (except *Lechmere*) assembled at Serjeant's Inn, and that they were all of opinion, that this conditional promise had brought the case out of the Statute of Limitations; and that a general *indebitatus assumpsit* might well be maintained, because the defendant has waived the benefit of the Statute."

The decision is, that the promise had brought the case *out of* the Statute; the reason of the decision is, that the defendant, by the promise, had *waived* the benefit of the Statute.

This decision is a good exponent of what was the law of England, on this question, at the era of our Revolution, and for nearly a century before. And whatever was the law of England, at that era, became, by adoption, the law of Georgia.

The question, whether it is the old promise or the new, that shall be the cause of action, is, it seems to me, a question about means, not ends. Whichever it be that is to be the cause of

action, the *cases* which will be saved or not saved from the operation of the Statute of Limitations, will be the very same.

This being so, the ends, I think, will be better attained by letting the old promise remain the cause of action, than they will be by making the new the cause of action.

If the new promise be made the cause of action, there may happen cases in which the rule will not work well, if it will work at all.

For example, what would be the period of limitation for an action, the cause of which was a new promise to pay a barred promissory note, or a barred draft? Six years, or four? Or for an action, the cause of which was a new promise to pay a barred bond—twenty years, or four?

In the case of a new promise to pay a barred debt, secured by note, draft or bond, and the death of the promissor before performance of the promise, what would be the rank of the debt against the dead man's estate—the rank of a bond debt, or that of an open account?

In the case of a new promise to pay a barred negotiable instrument, and of the transfer of the instrument after the making of the new promise, what would be the transferee's cause of action? Not the old promise; for the rule says, it is the new promise, and not the old, that must be the cause of action. Not the new promise, because that it is a promise which was not made to the *transferee;* and besides, is such a promise as is not negotiable.

The rule, over and above the difficulty it would have with these cases, and perhaps others which do not occur to me, would raise a grave question of strict law—the question, whether a new promise, *without a new consideration*, can bind; the question whether, if the old promise is not sufficient to support an action, it can be sufficient to support a new promise which is to support an action?

In short, I see not as much as one reason for the introduction of this new rule, and I think I see several reasons against its introduction.

Adhering, as I do, to the opinion, that it is the old promise and not the new which, in this case, ought to be considered the cause of action, I have no difficulty in agreeing with the majority of the Court in the *judgment* which they think ought to be pronounced in the case. That judgment is, that it was error in the Court below to regard the action as not having been authorized by the said Act of 1847; and for that reason, to dismiss the action.

This being the judgment of this Court, it becomes unnecessary to decide the other questions in the case.

No. 49.—DAVID H. WRIGHT, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

[1.] The absence of Counsel, as a ground of continuanee, is not favored by the Courts; especially where there is associate Counsel of acknowledged ability.

[2.] To continue a case, on account of the absence of Counsel, the affidavit should state that deponent expects to procure his services at the next term.

[3.] Popular excitement is no ground for postponing a cause, after one term of the Court has intervened since the crime was committed; neither does the subsequent renewal of the excitement, by newspaper agitation, produced by the escape and re-capture of the defendant, entitle him to further indulgence on this account; it being against public policy to allow a party to take advantage of his own misconduct.

[4.] To continue a cause, on account of the absence of a witness, it must affirmatively appear that he has been subpœnaed; information, as to the fact, will not suffice, unless it be verified.

[5.] The mere formation and expression of an opinion, does not necessarily disqualify a Juror; it should be deliberate, fixed and abiding.

[6.] In an indictment for killing a D. Sheriff, the official character of the party slain need not be alleged.

[7.] If a charge is requested of the Court, and given by reading the law from the reports of this Court upon the point, it is the duty of the Counsel

to suggest that the law, as read, does not cover the whole ground; otherwise, a reversal cannot be claimed for the omission.

[8.] Professional ethics and courtesy.

[9.] The judgment will not be arrested in a criminal case, because the indictment was not formally read to the Jury, nor submitted to the opposite Counsel. The objection going to the arrest of the judgment, and not affecting the real merits of the offence, charged in the indictment, comes too late after verdict.

Murder, in Muscogee Superior Court. Tried before Judge WORRELL, at January Term, 1855.

David H. Wright was indicted at June Term, 1854, for the murder of Alexander M. Robinson, alleged to have occurred in February, 1854. At June Term, 1854, a copy of the indictment and list of witnesses was waived. At January Term, 1855, when called for trial, Wright moved a continuance upon thefollowing showing:

THE STATE *vs.* DAVID WRIGHT. } *Indictment for Murder, in Muscogee Superior Court.*

And now, at this term, comes the defendant, in his own proper person, in open Court, and asks the continuance of said case; and for causes of continuance, states, on oath—

That Walter T. Colquitt, Esq. is his original and leading Counsel in said case; that since he has been accused of said offence, and during all the period of his confinement in jail, he is the only one of his Counsel with whom he has personally conferred in the preparation of his defence, and with whom he has fully and freely communicated in relation thereto; that for the employment of his Counsel he is indebted to the kindness of his father; and that said Walter T. Colquitt was his first and leading choice, and the Counsel upon whom he mainly relied, and with whom he has mainly conferred. And defendant saith, that he feels both unwilling and unready to go to trial, without his aid and assistance; and that he is informed, and believes, he is unable, from serious indisposition, to render him such aid and assistance.

And as a further ground for continuance, deponent states that he cannot go safely to trial in the present excited state of the public mind against him; that acting upon the love of liberty, which he presumes common to all, he escaped from his long and tedious confinement in jail; and that individuals, aided by the public press, have used the occasion of his re-capture and return to jail, occurring on the 30th ult. and during the present term of this Court, to throw out the most exaggerated statements concerning him; and thus, so to influence public prejudice against him, as to create, he apprehends, the too general desire and hope that he has been remanded to jail, there to remain until he is taken thence by the sentence of the Court, and to prevent him from obtaining, at the present term, a fair and impartial Jury. And this deponent saith, that his application for a continuance of the case on these grounds, is not made for delay, but to accomplish for himself a fair and impartial trial, and to be aided therein by the Counsel of his choice; that he hopes, by another term of the Court, that the health of the said W. T. Colquitt will be restored, and such aid rendered him; and that by another term, the public excitement and prejudice against him now so industriously created, will have abated, and that he will be able to select a Jury, uninfluenced and unaffected thereby.

And deponent further saith: Christopher Finley is a material witness for him, and that he is informed and believes, that he has been subpœnaed, and resides in the County of Bibb, and is not absent, by his leave, consent or procurement.

That he expects to prove by said Finley, that he was in company with this deponent on the night of the alleged shooting, and that he, this deponent, had no pistols or other firearms; and that the pistol or pistols said to have been found near where he was arrested, were not the pistols of this deponent; and that he, the deponent, did not have the same in his possession on the night of the shooting; and he further

expects to prove by said Finley, that he (Finley) was near by when Robinson was shot, and that there was but one pistol fired on the side walk in front of the Pleasant Hour, where said shooting of Robinson occurred.

Deponent saith, that this affidavit is not made for delay, but to enable him to procure the evidence of the said Finley, which he hopes and expects to do at the next term of the Court. DAVID H. WRIGHT.

Sworn to and subscribed in open Court, this 9th Jan. 1855.
DAVID J. BARBER, Clk.

The Court over-ruled and denied the motion; to which ruling and decision, the said defendant, by his Counsel, then and there excepted.

A Jury was impannelled, and the Sol. Gen. *pro. tem.* James N. Ramsey, submitted the cause to the Jury, by an opening speech explanatory of the nature and importance thereof, but without submitting the bill of indictment against defendant to the Jury, by reading the same, or tendering the same to his Counsel.

During the impannelling of the Jury in the case, one Jenkins Lowe was called as a Juror, and being put upon his *voire dire*, in answer to the usual question, rendered himself competent. The prisoner demanded the examination of the Juror before triors, which was granted, and before the triors the Juror announced, "that he had formed and expressed an opinion from rumor and report, but that such opinion was not fixed and decided; that he had said, if what he had heard should be proved to be true, the prisoner ought to be hung; that he had heard the prisoner shot down deceased in the street, when he went to arrest him, without provocation;" thereupon, the Court charged the triors, "that the mere formation of an opinion did not disqualify a Juror, but that such opinion must be both formed and expressed, and must be fixed and decided; and that if not so fixed and decided, it did not disqualify him."

To this charge the defendant excepted.

During the impannelling the Jury, very many of the Jurors called were put before triors; and the Court, in all such cases, charged the triors, as the law, that the mere formation of an opinion did not disqualify a Juror; but that it must be both formed and expressed, and fixed and decided, to amount to a disqualification; and to each and every of such charges defendant excepted.

During the progress of said trial and the taking of the evidence therein, it was proposed to prove the deceased, at the time of said killing, was the Deputy Sheriff of said County of Muscogee, and had a warrant against the defendant, and to give in evidence said warrant. To all and every part of which evidence, and to the admissibility of said warrant in evidence, the defendant, by his Counsel, objected; which objection was over-ruled, and defendant excepted.

The Counsel for the prisoner asked the Court to charge the Jury, that they were the judges of the law as well as of the facts in criminal cases.

In answer to this application, the Court replied, "that he would, if not objected to, read what the Supreme Court had said upon that subject, which was as plain as any thing he could say." And therefore, no objection being made, the Court read from the case of *The State vs. Holder*, (5 *Ga. R.* 445,) the following words—giving no other or further charge in answer to said application: "We only say, that it is the right and duty of the Court to declare the law in criminal cases, as well as in civil; and that it is, at the same time, the right of the Jury to judge of the law as well as of the facts in criminal cases." To which refusal to charge and charge given, defendant excepted.

Objection was made to the verdict being received, on the ground that the indictment had not been read to the Jury or submitted to the Counsel. The Court over-ruled the objection, and defendant excepted.

On these several exceptions, error has been assigned.

WELLBORN and H. HOLT, for plaintiff.

McDOUGALD & RAMSEY, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The first error complained of in this case is, that the Court over-ruled the motion for the continuance of the cause. The application was based upon three grounds—1st. The absence of the late Judge Colquitt, one of the prisoner's Counsel. 2dly. The excitement of the public mind which would not admit of an impartial trial; and 3dly. The non-attendance of the witness, Finley.

Was the showing sufficient to entitle the defendant to a postponement of his trial?

[2.] As it respects the absence of Counsel, upon whom the prisoner, as he alleges, mainly relied for his successful defence, on account of his great powers as a criminal advocate, the showing is defective in this: Mr. Wright fails to state, and for the reason, no doubt, that he could not conscientiously, that he *expected* to have the benefit of his services at the next term of the Court. He did swear that he *hoped* he would recover, so that he might have his aid. So we all did. But it was hoping against hope, from the known character of his disease. The absence of Counsel, when resisted, is a ground of continuance not favored by the Courts; and especially as in this case, when the accused was defended by two of the most distinguished members of the bar. Had Judge Colquitt been taken suddenly ill, leaving no time or opportunity for his place to be supplied by others, the case would have been different.

[3.] As to the excited state of the public feeling, it will be remembered that the true bill was found against the defendant in June. He was then arraigned, and waived a copy of the indictment and list of witnesses. The killing had taken place the February before. And when put upon his trial in January, 1855, he asks a continuance, not so much on account of the excitement resulting from the offence with which he was

harged, but because of the newspaper agitation of the subject, occasioned by his subsequent escape and re-capture; and e assigns, as an apology for this last act, his love of life and iberty.

While we readily concede that this was a very natural step n his part, we apprehend it would be a most dangerous doctrine to establish, that a party should invoke his own misconuct and the consequences necessarily resulting therefrom, s a reason for the indulgence which he seeks. Popular exitement has never been made the ground for a continuance, xcept at the first term; and that, too, when the crime had een but recently perpetrated. Here, there would have been sufficient cooling time between February, 1854, and Januay of the next year, eleven months; and all that transpired ithin that interval, being the legitimate fruits of the deendant's own doings, it cannot be sanctioned by the Court s a proper excuse for postponing the trial.

[4.] In addition to other objections which might be stated, here is one fatal omission as to the witness, Christopher 'inley. He resided in a few hours' travel of Columbus. The efendant had the most ample time and opportunity to have ubpœnaed him. He swears that he was informed and beeved that this was done; but he should have proven the fact, his being the second term of the Court after the true bill 'as found. If true in point of fact, it would have been so asy to make it appear. The ends of justice could hardly be bserved, by continuing a cause upon such a statement. He ot only came short of proving that the witness was subpœaed, but he made no application to the Court for compulsory rocess to compel his attendance, and a suspension of the rial until this could be done. This witness, as the record iscloses, saw the homicide committed. One may well doubt, nder the circumstances, whether the attendance of Mr. Finey was desired or desirable.

Upon none of these grounds then, nor upon all of them aken together, can we say that the Court below, flagrantly bused its discretion in refusing to delay this cause.

[5.] The second error assigned is, the charge of the Court to the triors, in relation to the competency of Jenkins Lowe as a Juror; and in causing the said Lowe to be put upon the prisoner as a competent Juror.

The point of this exception is, that the Court charged the triors that the mere formation of an opinion did not disqualify a Juror, but that the opinion must be both formed and expressed; and must be fixed and decided; and that if not so fixed and decided, it did not disqualify.

Lowe stated, upon his examination before the triors, that he had formed and expressed an opinion from rumor and report; but that it was not fixed and decided; that he had said that if what he had heard should prove true, that the prisoner ought to be hung; that he had heard that the prisoner shot down the deceased in the street, when he went to arrest him, without provocation.

We concede that the Court was not altogether so happy, perhaps, in the instruction given to the triors. The Juror had, upon his *voire dire*, rendered himself competent by answering both of the Statutory questions in the negative. The prisoner still apprehending that he might not be indifferent, demanded triors, as he had a right to do. And the Court should have told the triors, that the issue submitted to them was, whether or not the Juror was undecided. The Court might then have furnished them with such tests as the law supplies, to ascertain the fact submitted for their finding.

Still, was the charge illegal? We hold that it was not, even as understood by the learned and able Counsel who have argued this cause. Their complaint is, that the Court was wrong in instructing the triors that the mere formation of an opinion, was not sufficient to disqualify a Juror; but we maintain that the Court was right, and the presiding Judge might have gone further, and have charged them that the *mere* formation and *expression* of an opinion, does not, necessarily, render a Juror incompetent; that it depends upon the *character* of the opinion, and not upon the formation and expres-

on of it. Mr. Lowe had both formed and *expressed* an opin-n unfavorable to the defendant; and yet, Mr. Lowe, ac-rding to the adjudications, was a good Juror.

We apprehend, however, the Court meant to say, that neith-r the formation nor expression of an opinion, would exclude Juror, unless it was settled and abiding. No other decision ould have applied to the circumstances of Mr. Lowe's case. o have charged that the mere formation of a fixed opinion ould disqualify, would have been a mere abstraction as to lr. Lowe, who had both formed and *expressed*. He did not and in the category of one who had *formed* an opinion only, hether that opinion was irrevokable or evanescent.

The next complaint is similar to this, namely: That in im-annelling the Jury, many of them were put upon triors, hen the Court repeated the same instructions.

We will not reiterate what we have already said. If every ther Juror was in the predicament of Mr. Lowe, the charge as an abstraction, as understood and argued by Counsel; nd it does not appear, affirmatively, that they were not. o this as it may, the Court enunciated no false doctrine, and Counsel desired a charge more full and definite, it was eir duty to have called the attention of the Court to the oint. They should have called upon the Court to say to the iors, that the mere *formation* of an opinion, provided that pinion was fixed and continuing, was a disqualification. No ch charge was requested; none to the contrary of that was iven, and if given, was not applicable, certainly, to the case f Jenkins Lowe, the only Juror, concerning the exact state f whose mind we have any information.

[6.] The next exception is, that the Court erred in admit-ng all the evidence which went to prove the official charac-r of the deceased; and his having in his possession a war-nt at the time of the killing. Having decided this point dversely to the plaintiff in error, in Boyd's case at Columbus 1 January last, and being well satisfied that the official haracter of the party killed, need not be set out in the in-ictment, we affirm the judgment of the Circuit Court, upon

this ground. The fact that Robinson acted as D. Sheriff, and by virtue of warrants placed in his hands, with which to arrest Wright, constitute a part of the proof in the case, and need not be alleged in the indictment. He placed his hands upon Wright, saying, "I arrest you." This would be a trespass on the part of Robinson, but for his authority; and hence, the reason for showing that he acted officially as the agent of the law.

[7.] The next assignment is, the refusal of the Court, when asked by Counsel for the prisoner, to charge the Jury, that they were the judges of the law as well as the fact in criminal cases.

It will be seen, by reference to the statement of facts, that instead of giving the charge directly, the Judge proposed to read to the Jury, "if agreeable," what this Court said upon that subject. No objection being made, His Honor read a paragraph from the case of *Holder against The State*, (5 *Ga. Rep.* 445,) to this effect: "that it is the right and duty of the Court to declare the law in criminal cases, as well as in civil; and that it is, at the same time, the right of the Jury to judge of the law as well as of the facts, in criminal cases."

Was not this instruction commensurate with the charge asked? Could the Jury entertain any doubt as to their duty, resulting as it did, necessarily, from their right? Did it not put both the right and duty of the Jury, in criminal cases, upon the same footing *as to the law* upon which they stood, *as to the facts*?

And here, again, we recur to a position taken by this Court at Columbus, and which we shall enforce with increasing stringency in the trial of causes. When prisoners had scarcely any rights, and were deprived of the benefit of appearing by Counsel, it might do to talk of their *standing* upon all their rights, what few they had. At least, this expression had some significance then. But it has lost it at this day. Their rights are ample. And with this new state of facts, have sprung up corresponding duties. Why this appearance, by Counsel, a right long denied by our British an-

estry, but guaranteed by the Constitution? It is partly to id the Court in the ascertainment and application of the law. lo bench is sufficient, of itself, for these things, however pro- ound its learning, or admirable its wisdom. The object of ppearance by Counsel, is not to carry the case, by manage- ent, right or wrong, against the law and against the evi- ence; but to see that the laws of the land are correctly ad- inistered.

To expect a Judge to recollect, at the moment, all the law pplicable to all the facts of the case, and to state it with chnical and critical accuracy, with all the exceptions and ualifications, is to require an impossibility. We have a triking illustration of this fact, on the trial of Aaron Burr n 1807. What opinion should be deemed a sufficient ground f challenge, was the question made to the Court, and argued alously by Counsel. (*Burr's Trial*, 1 *Vol.* 370.)

When a Juror was called to the book and interrogated, hief Justice *Marshall* said: "The simple question is, wheth- r the having *formed* an opinion, not upon the evidence in ourt, but upon common rumor, renders a man incompetent o decide upon the real testimony of the case." So much, now, or the statement of the point. At page 415, the Chief Jus- ice, in delivering the opinion of the Court, after the ar- ument, says: "I have always conceived, and still con- eive, an impartial Jury, as required by the Common Law, nd secured by the Constitution, must be composed of men ho will fairly hear the testimony which may be offered to hem, and bring in their verdict according to the testimony, nd according to the law arising on it. This is not to be ex- pected—certainly the law does not expect it—where the Ju- ors, before they hear the testimony, have deliberately formed *nd delivered* an opinion, that the person whom they agree to ry is guilty or innocent of the charge alleged against him." s it not perceived, that the question, as put, was, as to the mere *formation* of an opinion? But as re-stated in the decis- on, it refers to an opinion *deliberately* formed *and delivered.*

The report of the case shows, that the question was as to the *formation* of an opinion upon common rumor.

Finding, then, such looseness of language in the mouth of this truly learned and great man, of whose talents his country will be justly proud for ages, to demand that degree of accuracy contended for frequently, would amount to a virtual repeal of both the Penal and Civil Code. And it is this which constitutes the strong and stubborn objection to the Procrustean Act of the last Legislature, known as the New Trial Act. It requires impossibilities.

Counsel, then, have duties to perform. They must call the attention of the Court to any thing omitted or overlooked, and failing to do so, they must not come here and claim a reversal, not because the Court has not charged the law correctly, but because it has omitted to charge all the law, with all possible precision and verbal accuracy.

[8.] It is suggested, that it would have been disrespectful in Counsel, to have interposed any objection to the reading of a portion of one of the decisions of this Court, even when asked if they had any. *There is nothing that Counsel may not do, in the prosecution and defence of the rights of their clients, provided the manner of doing it is courteous and respectful.*

Says Professor Sharswood, in his Lectures on Professional Ethics: "Fidelity to the Court, requires from the bar outward respect, in words and actions. The oath of an Attorney undoubtedly looks to nothing like allegiance to the person of the Judge, unless in those cases where his person is so inseparable from his office, that an insult to the one is an indignity to the other. In matters collateral to official duty, the Judge is on a level with the members of the bar, as he is with the rest of his fellow-citizens; his title to distinction and respect resting on no other foundation than his virtues and qualities as a man. There are occasions, no doubt, when duty to the interests confided to the charge of the advocate, demand firm and decided opposition to the views expressed, or the course pursued by the Court—nay, even manly and open remonstrance. But this may be, and yet that outward respect

be preserved, which is here inculcated. Counsel should ever remember how necessary it is, for the dignified and honorable administration of justice, upon which the dignity and honor of their profession very much depend, that the Courts and the members of the Courts, should be regarded with respect by the suitors and the people; and that on all occasions of difficulty and danger to that department of government, they should have the good opinion and confidence of the public on their side. Good men, of all parties, prefer to live in a country in which justice, according to law, is administered."

"Counsel should bear in mind, also, the wearisomeness of a Judge's office—how much he sees and hears, in the course of a long session, to try his temper and patience. Respectful submission—nay, most frequently, even cheerful acquiescence in a decision, when, as is most generally the case, no good result to his cause can result from any other course, is true wisdom, as well as propriety. *An exception may be noted to the opinion of the bench, as easily, in an agreeable and respectful, as in a contemptuous and insulting manner.* The excitement of the trial of a cause, is no doubt often the reason and apology for apparent disrespect in manner and language; but let it be observed, that petulance in conflicts with the bench, which renders the trial of causes disagreeable to all concerned, has, most generally, an injurious result upon the interests of clients." (*Ps.* 14, 15, 16.)

[9.] The next and last objection is, that the Court erred in permitting a verdict to be rendered, received and recorded, upon a bill of indictment not tendered to the opposite Counsel nor read to the Jury. The indictment was before the Jury; the case was tried upon it; the verdict was written and returned upon it. No requirement was made, at the commencement of the trial, that it should be read. What is the object of this writ of error? To arrest the judgment; and the Code is explicit, that nothing can be heard for this purpose, which does not *affect the real merits of the offence* charged in the indictment. (*Cobb's Dig.* 833.) This excep-

tion is to a matter of form in the proceedings; and comes too late, after trial and verdict.

Upon this, and upon any other matter in criminal or civil proceedings, while we shall always guard, carefully, every point, great or small, affecting the real merits of the case, we feel it to be a solemn duty, imposed by the whole tenor and spirit of our laws, as well as by the everlasting principles of justice, to struggle hard to get round all mere formal objections.

Upon the whole case, then, while there may have been some irregularity yet, we see no sufficient reason for reversing the judgment and ordering a new trial.

No. 50.—WILEY B HORTON and another, propounders, &c. plaintiffs in error, *vs.* ALEXANDER JOHNSON AND WIFE, defendants in error.

[1.] Will, subscribed in the presence of the testator, by two witnesses, each for himself, and one of them for a third person, all being present at the same time: *Held*, that it is an insufficient attestation, under the Statute of Frauds. The third witness, who could not write, should have made his mark.

Probate of will, in Stewart Superior Court. Tried before Judge WORRELL, April Term, 1855.

A single question was made in this case. Jesse G. Meadows, one of the witnesses to the will, not being able to write his name, another of the witnesses wrote it for him and at his request. He was about to make his mark, when testator said it was unnecessary, if the witness was present, saw it done and assented to it.

On these facts, the Court below refused probate to the will. This decision is assigned as error.

TUCKER & BEALL, for plaintiff in error.

B. S. WORRILL and JAS. JOHNSON, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] In the matter of Horton's will, we think the Court was right in refusing to allow the same to go to probate. Two of the witnesses only subscribed the paper. True, the name of the third was written under the attestation clause, by one of the two who did subscribe. But this will not suffice.

The Statute of Frauds requires, that all devises and bequests of lands and tenements, shall be in writing, and signed by the party so devising the same, or by some other person, in his presence and by his express directions; and shall be attested and subscribed, in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of none effect. (*Cobb's Digest*, 1128.)

Thus, it will be seen, that while the name of the *testator* may be signed by a third person, provided it be done in his presence and by his express directions, no such indulgence is extended to the subscription by the witnesses. And the maxim, that the mention of one thing is the exclusion of all others, applies.

Again, we find decisions which go to the extent of permitting a witness to subscribe by his mark; but none going beyond that, and embracing the present case. (1 *Greenlf. Ev.* §272, and authorities there cited.)

On the other hand, we have one case from the Prerogative Court of England, directly in point, against the sufficiency of the execution. (*In re White, Prerogative Court, Nov.* 2, 1843, 7 *Jurist, page* 1045.) The will, in this case, was written for the deceased, by a Mr. Culverhouse, and was signed by the deceased in the presence of Mr. and Mrs. Culver-

house, both being present at the same time. Mr. Culverhouse, then, subscribed his name, as witness, to such execution, in the presence of the testator and of his own wife; and also, in the like presence, subscribed the name of his wife as the second witness.

Dr. Haygard moved for probate; and submitted, that the rule "*qui facit per alium, facit per se*," applied.

Sir *H. Turner Prest*—"It is impossible to grant probate of this paper. Why did not Mrs. Culverhouse make her mark to the will? Motion rejected."

Putting the case, then, upon the express terms of the Statute of Frauds, and not intending to apply the doctrine to other instruments, we affirm the judgment of the Court below; and we do not regret it. In nine cases out of ten—perhaps, in ninety-nine out of a hundred—the Statute of Distributions makes a better disposition of property than the testator. The making unnatural wills, for old and superannuated people, has got to be just as much a trade as selling subjects to the dissecting surgeons in cities; and is becoming, we regret to say, the fruitful source of the bitterest family feuds among our people. We speak not of Mr. Horton's will, for we know not its contents. We do know, however, from the testimony, that he was between 70 and 80 years of age when he made his will; and that it is a grand-child, the lineal descendant from his loins, and who represents a deceased parent, that is resisting its probate and execution.

No. 51.—JAMES B. NEAL, plaintiff in error, *vs.* ALEXANDER E. ROBERTSON, defendant in error.

[1.] An amendment to an action for land, brought under and by virtue of the Act of 1847; which amendment proposes to insert other plaintiffs, viz: the heirs of the grantee, is not admissible.

Suit for land, in Stewart Superior Court. Tried before Judge WORRELL, April Term, 1855.

This was an action for the recovery of land brought under the form prescribed by the Act of 1847. At the trial, plaintiff's Counsel moved to amend the declaration, by inserting the names of the heirs of the grantee as co-plaintiffs. The Court refused the amendment, and plaintiff excepted.

Plaintiff then moved to amend, by adding a new count following the same form, and varying only in placing the said heirs as parties plaintiff. The Court refused this amendment, and plaintiff excepted.

Error has been assigned on these exceptions.

CLARK, for plaintiff in error.

TUCKER, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] The right to make the amendment moved in this case, has been put upon the ground of the practice which prevails in actions of ejectment at Common Law, of laying several demises in several lessors. If this were such a proceeding, there can be no doubt, that under our laws, as they now stand with respect to amendments, at any stage of the cause, an amendment might be made, inserting a new demise and new lessors. But this would be permitted upon the principle which lies at the foundation of that proceeding, viz: that John Doe is the real plaintiff; that he is the lessor or tenant of those in whom

the demises are laid; and by reason of the fiction upon which the frame of the action rests, these lessors, instead of being different parties, are all in union of interest with the plaintiff. When, therefore, a recovery is had by and through the title of either of these lessors, that recovery is held to enure to the benefit of the plaintiff, John Doe, and through him, it is supposed to operate for the benefit of that lessor who is the actual party in interest. So, that when the writ of *habere facias* issues, (though at the point of time when it becomes necessary to execute it, the operation of the fiction ceases, and the Sheriff is required to put the lessor, whose title is successful, in possession,) it issues for the benefit of the plaintiff, John Doe, or rather through him, for the benefit of that lessor who is the real person in interest. Some Courts have required, that the consent of all the lessors should be obtained before their names are used. In which event, this mutuality of interest is supposed to be rendered certain.

In the case before us, it is a real person who brings a real cause of action, in which a flesh and blood plaintiff alleges; that he claims title to the land in question and prays a recovery of the same absolutely and in his own right. If, now, an amendment be made and other real plaintiffs be inserted, viz: the heirs of the grantee, will not this be the introduction of new parties plaintiff, and of a new cause of action?

If it be allowed, how will the proceeding be regulated? In whose favor will the writ of possession operate? Who shall be responsible for costs?

These questions are suggestive of the diffculties and complications which would arise out of such a proceeding, and lead us to the conclusion, that the amendment proposed is not admissible.

Very slight legislative provision, perhaps, might make such an amendment appropriate, and give it a fit legal relation to the other count.

Let the judgment be affirmed.

No. 52.—SACKETT, DAVIS & POTTER, plaintiffs in error, vs. TUCKER, BURKE & THORNTON, defendants in error.

[1.] An action of debt was brought on a bond, which the declaration alleged to have been taken by the Sheriff from the principal obligors, while they were in custody of the Sheriff, and as to which the declaration contained other allegations, going to show that the bond was intended, by the Sheriff and all the obligors, to be an ordinary bail bond; and also contained an allegation, that the bond was "voluntarily tendered" to the plaintiffs by the obligors. In support of the action, the only evidence introduced was the bond itself. This corresponded with the declaration, except that it lent no support to the allegation, that the bond was voluntarily tendered. A motion for a non-suit was sustained: *Held*, that the motion ought to have been sustained.

Debt, in Stewart Superior Court. Decision by Judge WORRELL, April Term, 1855.

This was an action on a bond purporting to be and taken as a bail bond. The condition of the bond was, "if the said G. and J. Zuker, (the principals) in case they are cast in said suit, shall render their bodies to prison, in execution of the same, in terms of the law, in such case made and provided, and upon failure thereof, the securities will do it for them."

A motion was made for a non-suit, on the ground, that the bond has therein a condition onerous to the obligors, and not authorized by law; and therefore, void.

The Court sustained the motion, and this decision is assigned as error.

CLARK, for plaintiff in error.

J. JONES; HARRISON, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] These parties have been in this Court once before on this bond. The case was then on a *scire facias* against the

bail, in pursuance of the fifteenth section of the Judiciary Act of 1799. And the decision was, that the bond was not good as a bail bond. That decision the parties plaintiff, in the present case, say that they do not seek to disturb. They, in this case, treat the bond as a bond executed *voluntarily* on the part of the obligors.

The decision complained of, is a decision sustaining a motion for a non-suit. What evidence was introduced by the plaintiffs in the case, the bill of exceptions does not show. It shows enough, however, to authorize the inference, that the bond, itself, was in evidence.

Does the bond, then, by itself, constitute a sufficient evidence to support the declaration?

The declaration alleges that Potter, one of the plaintiffs, made affidavit that the two Zukers were indebted to the plaintiffs $678 03, besides interest, and that "defendant" (doubtless a mistake for deponent) had reason to apprehend the loss of said sum, or some part thereof, unless the said Zukers should be held to bail; that this affidavit was filed, and copies of it were attached to the declaration and process, and to the copies thereof; that afterwards, the Clerk issued process in the usual form; that on the back of the declaration and process, the amount sworn to was endorsed; that "said declaration, process and copy-affidavit, having the amount sworn to endorsed thereon, (making the same a bail process) was placed in the hands of the Sheriff, and was, by him, duly served and executed on the said two Zukers, "by serving each of them with a copy thereof, and by taking each of them in custody;" and that the said Zukers being so in custody at the suit of them, the plaintiffs, "by virtue of said bail process, afterwards and before the return of said writ, gave" the said Tucker, Thornton & Burke, "as securities for the performance of certain acts and stipulations as in the bond," were contained, in consideration of one thousand dollars paid by the said Zukers to said Tucker, Thornton & Burke; and that the said two Zukers, Tucker, Thornton & Burke then *voluntarily* tendered and delivered to the plaintiffs their bond for

$1356 06, with a condition, in substance, as follows: "That whereas a civil process, requiring bail at the suit of said firm of Sackett, Davis and Potter in an action of debt, returnable to the Superior Court of said county on the third Monday in October next, (after the date of said bond) hath been served upon the said Goodman and Jerome Zuker; now if the said Goodman and Jerome, in case they are cast in the said suit, shall render their bodies to prison, in execution of the same, in terms of the law, in such cases made and provided, and upon failure thereof, the said securities will do it for them, then the said bond to be void, else to remain in full force." The declaration then alleges, that the plaintiffs recovered against the Zukers in the suit, and that for the amount of the recovery a *ca. sa.* was issued against the Zukers, which was returned with the entry, that neither of them was to be found, and that they did not render their bodies to prison, nor did the said Tucker, Thornton & Burke do it for them.

This is the declaration. The essential allegation in it, under the circumstances, is, that the obligors "*voluntarily*" tendered and delivered to your petitioners the bond in question. Now does the bond, itself, when considered as evidence, show this allegation to be true? If the bond shows any thing on the point, it shows the contrary to be true. If it shows any thing, it shows that the bond was not given voluntarily by the principal obligors, but was given by them under duress—given whilst they were in custody—given to obtain their liberty.

And when we look at the allegations in the declaration, as a whole, we are obliged to come to the conclusion, that they show the bond to be not a voluntary bond, but a bond, taken as an ordinary bail bond is taken—a bond, i. e. extorted under process of law, from a person in custody.

This being so, we have to consider the Court below to have been right in sustaining the motion for a non-suit.

I remark, that I am not to be understood, by any thing above said, as committed to the proposition, that a bond

which is void as "a Statutory bond," can be good as "a Common Law" bond.

It is proper for me also to say, that the Reporter was mistaken in saying, in his report of this case, when it was first in this Court, that I did not preside in it because I had formerly been of Counsel in it. I was never of Counsel in it. When the case was called, I did not happen to be on the bench, having left the bench on account of another case, or of other cases. Before I got back to the bench, this case had been argued, the argument having been a very short one. This was the reason why I did not then preside in the case.

No. 58.—SAMUEL L. TERRELL, plaintiff in error, *vs.* WM. B. BENNET, defendant in error.

[1.] In an action at law for deceit, in falsely representing a third person fit to be trusted, the *scienter* is material, and must be alleged and proved. The word *fraudulently* has been held to be a sufficient substitute for the other allegation.

Case for deceit, in Stewart Superior Court. Motion for a new trial. Decided by Judge WORRELL, April Term, 1855.

Wm. B. Bennet brought an action for deceit against Samuel L. Terrell, for fraudulently representing to plaintiff that one James O. Wilkerson was solvent, and thereby inducing plaintiff to give him credit.

It appeared, on the trial, that Bennet was a stranger to Wilkerson; that Terrell represented him to be perfectly good when he was utterly insolvent; that Bennet, relying on this recommendation, hired to Wilkerson two negroes, to work in his farm; that during the year, Terrell took from Wilkerson a bill of sale, to his entire growing crop, to secure a debt due him prior to the recommendation.

The Court charged the Jury, that the plaintiff must show the recommendation—that it was false, and that Bennet acted upon it; that if a party affirms that which he knows to be false, to the loss of another, or affirms that to be true which he does not know to be so, he is responsible for damages; that it is not necessary to show that the party making the representation is to derive benefit from it; neither is it necessary that the affirmation should be the sole cause of the credit being given, provided the credit would not have been given without it; that even if the party believed it to be true, but was mistaken, it was a fraud, in law, for which he is responsible in damages.

Counsel for Terrell requested the Court to charge—

1. That if the Jury believed that Bennet approached Terrell as a friend, merely to get an opinion of the solvency of Wilkerson, and that in such a spirit, Terrell did give an opinion, without any intention to defraud Bennet, then plaintiff could not recover.

2. That in an action for deceit, it must be shown that defendant knew the representations he made were false.

3. That it must appear, by evidence, that the credit was given on the faith of the representations of Terrell.

4. That if the defendant believed the representations he made and intended to do plaintiff a favor, and with no intention of defrauding him, that the plaintiff could not recover.

These charges the Court refused to give. Defendant moved a new trial, on the ground of error in the charge given, and the refusal to charge. The Court granted the motion, on the refusal to charge the 1st and 4th requests. By consent, all the questions made in the motion, however decided by the Court below, were heard and determined in the Supreme Court.

J. M. Clark, for plaintiff in error.

Tucker & Beall, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] This case comes up rather singularly. Various requests to charge were made and refused, and sundry charges were given. To all of which the defendant excepted. A verdict having been rendered for the plaintiff, the defendant moved for a new trial on all the refusals to charge, as well as on account of all the charges as given. The Court granted a new trial on two of the grounds, over-ruling all the rest; and still, the defendant excepts, and prosecutes this writ of error. And the agreement is, that this Court shall give judgment upon the whole case, which is to control its final disposition.

It would be a useless and vain thing to undertake to go over, *seriatim*, the various specifications set forth in the record. We state the general proposition to be this: that in an action at law for deceit, in falsely representing a third person fit to be trusted, the *scienter* is material, and must be alleged and proved. The word *fraudulently* has been held to be, a sufficient substitute for the other allegation. (1 *Chitty's Pl.* 388, *and note. Willes' R.* 584.)

This is the test, then, by which the instructions submitted by the Court to the Jury, and those which were withheld, are to be tried. Fraud is the gist of the proceeding. The representation must not only be false, but it must originate in a fraudulent motive, either to injure the party who is thereby circumvented, or to benefit the one who makes the representation. And whenever this is done, and the deception is practiced successfully, whereby damages result, a right of action accrues.

We affirm the judgment of the Court below in granting the new trial, leaving it for the parties to determine, for themselves, whether they will litigate further upon the special facts of the case.

No. 54.—THOMAS P. BARTEE, plaintiff in error, vs. JOSEPH ANDREWS, defendant in error.

1.] Under the Act of 1853–'4, passed for the purpose of compelling discoveries at Common Law, the absence of the party subpœnaed, will operate as a cause of continuance by the party summoning, according to the rules which govern in other cases of absent witnesses. When the continuances of the latter are exhausted, if it be the plaintiff who is absent, the Court may, in his discretion, dismiss the case; if the defendant, he may strike out the defence. But if good cause be shown for such absence, and the absent party has not exhausted his continuances, the Court may continue at his instance, or otherwise, put him upon such terms as will secure justice to the party seeking a discovery.

2.] A debt is liquidated *when* it is rendered certain what is due and how much is due. That certainty need not be contemporaneous with the agreement out of which it results.

Assumpsit, &c. in Stewart Superior Court. Tried before Judge WORRELL, April Term, 1855.

Joseph Andrews brought suit against Thomas P. Bartee for his wages as overseer. The contract proven was, that Andrews was to have one-fifth of the crop made. Bartee discharged Andrews during the year, gathered the crop himself, and failed or refused to pay him his share. At April Term, plaintiff's Counsel moved to strike out the defendant's pleas, on the ground that defendant had been subpœnaed as a witness, (under the Act of 1853–'4,) and failed to appear. It appeared that the plaintiff had exhausted his continuances, and that the cause had never been continued by defendant. The Court struck out the pleas, and this is assigned as error.

The Court charged the Jury: "that if they believed that Bartee did contract to give Andrews one fifth of the crop for his services, and had, without proper cause, discharged him before the end of the year, Andrews was entitled to recover interest on the amount the Jury should find to be due. This decision, also, is assigned as error.

J. M. CLARK, for plaintiff in error.

B. S. WORRILL; HARRISON, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.]. The first question in this case, is raised upon the Act of 1858–'4, amending the Act of 1847, passed for the purpose of compelling discoveries at Common Law. That Act provides that "any party plaintiff or defendant, in any action at Common Law, pending in any Superior, Inferior or Justice's Courts of this State, wishing a discovery from, or the evidence of, the adverse party on the trial of such action, may apply to the Clerk of said Superior or Inferior Courts, or to the Justice of the Peace, in whose Courts said action may be pending; in case the party whose evidence is desired resides in the county where said case is pending, for a subpœna, requiring said party to be and appear at said Court, and testify in said action as other witnesses now, by law, are required to do, which subpœna shall be served thirty days before the term of the Court at which he is required to attend; and in case said party shall fail or refuse to be and appear and testify in said action, as required, then and in that case, said cause shall be subject to the same continuances as are now allowed by law for the absence or non-attendance of other witnesses; and after said continuances are exhausted, said action shall be dismissed: *provided*, it be the plaintiff who refuses to appear and testify as aforesaid; or if the party who fails or refuses to be and appear as aforesaid, be the defendant in said cause, his plea or pleas, and answers, if he has filed any, shall be stricken out, and judgment given against him by default, or such other order may be taken and had in said cause as, in the discretion of said Court, may be just and proper."

Our construction of this Statute is, that when either party, in pursuance of its terms, makes a witness of the other, the

absence or non-attendance of that witness, may operate as a cause for continuance by the party summoning him, according to the rules which govern in other cases of absent witnesses, until the continuances of that party summoning are exhausted, when, in order to put it out of the power of the party summoned to defeat his antagonist, by still absenting himself, the Act has provided that the suit may be dismissed if the plaintiff be the witness; and if the defendant, that the Court may strike out his defence. If the case be on the appeal, as this was, and the plaintiff subpœna his adversary, who absents himself, the former may continue twice; and then, if the latter still be absent, his pleas and answer may be stricken out. If the defendant summon the plaintiff, and the latter absent himself in the same way on the appeal, after two continuances by the defendant, the case may be dismissed.

The difficulty made by the Counsel for the defendant in error, in the language of the Statute, can easily be obviated by a transposition of its terms, when its meaning will become plain, as follows: "Provided" (or if) "it be the plaintiff who refuses to appear and testify as aforesaid, and after said continuances are exhausted, said action shall be dismissed; or if the party who fails or refuses to be and appear, be the defendant in said cause, his plea or pleas and answer, if he has filed any, shall be stricken out," &c. Here I have changed no word, and yet it must be entirely plain, that the meaning is such as we give to the language of the Statute.

But the Act does not *imperatively* require that the case should be dismissed, or the defence stricken out, even after the continuances are exhausted and the party summoned still fails to attend. Such non-attendance might ensue from Providential cause; and in such case, it would be a great hardship, if his case were lost because of this, his misfortune. Hence, the Act furnishes the alternative provision, that "such other order may be taken and had in said cause as, in the discretion of said Court, may be just and proper."

Our view, therefore, of this case is, that though the plain-

tiff had exhausted his continuances, yet, the Court might have continued the case at the instance of the defendant, as he had never continued the same; or otherwise, in that discretion confided by the Statute, have put him upon terms. And we think, that as the defendant had been subpœnaed something like thirty days only before the Court, and there was no evidence of contumacy on his part, it was dealing too hardly with him to strike out his defence. This, probably, would not have been done, if the Court had not put that construction on the Act, which was insisted on by the Counsel for the defendant in error, viz: that he was required to do so, where the defendant was the party subpœnaed, and the plaintiff had exhausted his continuances.

[2.] The next question for our consideration is, whether or not the plaintiff shall have interest on any amount which he may be entitled to recover from the defendant. In other words, whether or not such amount is due from the defendant as a liquidated demand.

From the best reflection and examination which we have been able to bestow upon this case, we have arrived at the conclusion, that this is a liquidated demand, whether it be regarded as a promise to pay in money or specifics; for our law expressly provides that the latter may bear interest.

Liquidation is a fixed and determinate valuation of things, which, before, were uncertain. A debt is liquidated *when* it is rendered certain what is due, and how much is due—*cum certum est an et quantum debeatur*. That, certainly, need not be contemporaneous with the agreement out of which it results. Perhaps the difficulty in this case, on this point, grew out of the supposition, that this was necessary.

Now the agreement in this case was, that one fifth part of the crop was to be paid to the defendant, when it was made. This was a measure of the amount which the defendant was to receive. When did that amount become certain? Just when the defendant received and took possession of the crop, or of its proceeds; he had knowledge of the amount, and he knew that to one fifth thereof he was indebted to the plain-

tiff; and thus, *it became certain to him what was due.* It needed no further settlement or adjustment of accounts between them, in order that he might ascertain what was due. And if the same were due, and he continued to use it for his own benefit, no good reason can be given why interest should not be paid thereon, for such use. And therefore, we affirm the judgment of the Court on this ground.

No. 55.—ANN E. MCDOUGALD, adm'x, &c. plaintiff in error, *vs.* S. A. BELLAMY, adm'r of S. A. BAILEY, defendant in error.

[1.] It is not error in the Court to refuse to give a charge, which is founded upon a misapprehension of the testimony.

[2.] All who were at any time stockholders in the Planter's & Mechanic's Bank of Columbus, are liable to the bill-holders, unless they have transferred their stock six months before the failure of the bank, and given notice thereof, in some public Gazette of this State.

[3.] A stockholder ceases to be such, *inside of the charter*, so far as his rights and obligations are concerned, as a member of the corporation, from the date of his transfer of stock, whether notice is given thereof or not.

[4.] Can a stockholder, who has transferred his stock, but failed to give the notice required by the charter, and whose proportionate liability for the redemption of the outstanding circulation is equal to the bills which he holds, maintain an action under the 11th section of the charter, against another stockholder? Or if the amount of bills which he holds exceeds his liability, can he sue for such excess? *Quere.*

[5.] The stock of the Planter's & Mechanic's Bank of Columbus consisted of $1.000.000; and the charter required that $250.000 in specie, be paid before the board of directors should be permitted to issue bills. The president and directors, in 1837, organized and notified the Governor that the foregoing provision of the charter had been "literally and strictly complied with;" when, in fact, the twenty-five per cent. had not been paid, which was known to the board. The president subsequently transferred his stock, before any bills were issued. In 1838, a large amount of notes were put in circulation: *Held*, that an action cannot be maintained, by the ad-

minister of the president, to recover of a stockholder the amount of bills which he held at his death, under the 11th section of the charter, he having participated in the previous illegal proceedings, which were necessary to the making of said issue in 1838.

[6.] No one shall derive a benefit from the violation of the law, or from a fraud practiced by himself or others, to his own advantage.

[7.] Conceding that the Planter's & Mechanic's Bank of Columbus was organized and bills issued, without the actual payment of the $250,000 in specie, required by the charter; and that by reason thereof, the State might, at any time, have recalled its corporate franchises; or a stockholder have resisted the payment of stock; or a debtor his liability to the bank, provided the rights of third persons were not prejudiced: *Held*, that it was, nevertheless, a valid corporation, so as to make it liable to creditors for its own acts; and its stockholders liable to bill-holders, under the charter, for the ultimate redemption of the bills put in circulation by the bank.

[8.] Corporations are liable for the frauds and torts of their agents, done in the course of their employment, in the same manner as individuals are responsible for the acts of their servants, touching their business; the tendency of the law is, to place corporations and individuals upon the same footing.

[9.] The doctrine, that a corporation can only, through its agents, do *right*, and is not responsible for its *wrongs*, is exploded. The principal warrants the fidelity of his agent, in all matters relating to his agency.

[10.] The board of directors have authority to bind the bank, while acting within the scope of the general usage, practice and course of business of such institutions, so far as third persons are concerned, who have no knowledge to the contrary.

[11.] Where one of two innocent persons is to suffer from the tortious act of a third, he who gave the aggressor the means of doing the wrong, must alone bear the consequences of the act.

[12.] Notwithstanding a bank may have organized contrary to law, still, it is competent for the Legislature to pass a Statute of pardon, waiving the wrong; and in such case, the omission or abuse of authority cannot be set up as a defence by the defaulting corporation; nor relied upon as absolving it from the performance of its obligations.

[13.] The directors are the agents of the corporation, and not of the stockholders; yet, if they stipulate for the ultimate redemption of the bills issued by the bank, if the bank be bound by the acts of the agent, the stockholders are liable upon their special agreement.

Debt, &c. in Muscogee Superior Court. Tried before Judge WORRELL, December adjourned Term, 1854.

This suit was commenced by Samuel A. Bailey, as the holder

of bills of the Planter's & Mechanic's Bank of Columbus, against the adm'x of Daniel McDougald, one of the stockholders in said bank, to compel from him the ultimate redemption of said bills.

It appeared, on the trial, that Samuel A. Bailey was one of the original stockholders in the Planter's & Mechanic's Bank, holding a large number of shares. That he was the first president of the board of directors thereof, and consequently aided in its organization. As president, on the 9th May, 1837, he directed the following letter to Governor Schley, then in the Executive chair:

"Sir: The 4th section of the Act of the General Assembly, passed at its late session, entitled "an Act to incorporate a Banking Company under the name and style of the Planter's & Mechanic's Bank of Columbus," requires the officers of this bank, before issuing any of their bills, to report to your Excellency, that the provisions of the charter have been strictly and literally complied with. The sum of two hundred and fifty thousand dollars, in specie, having been collected by and paid over to us, by a committee of the stockholders, and the same being now at our control in the Bank of Columbus, being there deposited for safe-keeping, we, in obedience to the 4th section of said charter, hereby report to your Excellency, that the provisions of said charter have been strictly and literally complied with.

Very Resp'ly, &c.

(Signed) S. ARMSTRONG BAILEY, Pres't.
S. H. PECK, Cash'r.

Accompanying this letter was the annexed affidavit:

GEORGIA, MUSCOGEE COUNTY:

Personally came before me Samuel A. Bailey, Pres't, Samuel H. Peck, Cash'r, and H. G. Smith, Hines Holt, Jr. A. B. Ragan, F. C. McKinley and S. R. Bonner, directors of

the "Planter's & Mechanic's Bank of Columbus," who, being duly sworn, say that the facts stated above are true.

(Signed) S. ARMSTRONG BAILEY, Pres't,
S. H. PECK, Cash'r,
H. S. SMITH,
A. B. RAGAN,
F. C. McKINLEY,
S. R. BONNER, } *Directors.*

Sworn to and subscribed before me this 9th May, 1837.
GEORGE CHATFIELD, J. P.

MATTHEW ROBISON testified: The bank commenced its operations as a suspended bank; never was able to pay its debts in specie in any one day, if they had all been presented together. Bailey owned, at one time, 1575 shares of the bank; transferred them, at various times, up to 5th February, 1838. On 1st February, 1838, a new president and board of directors were elected; knows of no specie being paid in by the stockholders. On the 5th February, 1838, there was very little specie in the bank—somewhere between $5 and $1.000. On 26th May, 1843, there were in circulation, of the bills, $229.000. $20.000 were hypothecated with John L. Mustian, as security for money loaned.

A. B. RAGAN testified: He was cashier in 1837; H. S. Smith was first president, for a few weeks, and succeeded by Bailey. After the stock was taken, and before the officers were elected, a committee was appointed, (of which Bailey was one,) to whom the stockholders paid 25 per cent. on the stock, partly in bank bills, partly in checks on other banks, and partly in stock notes—only one stockholder paid in specie. The committee made an arrangement with the Bank of Columbus for a specie certificate of deposit of $230.000, and with the Insurance Bank for a like certificate for $20.000, for which the committee turned over to these banks the stock, notes, checks, &c. as aforesaid. Specie was then worth a premium of 5 per cent.; no premium was paid to these banks. The election for officers then took place. These certificates were held by the directors, for a week or two, and were then

returned to the Bank of Columbus; and in lieu thereof, a credit of $250.000 was placed on the books of that bank, to the Planter's & Mechanic's Bank. Some time afterwards it was agreed to loan out the capital stock, except about 2 per cent. retained for expenses, giving the stockholders the preference, and taking their notes, and giving a check on the Bank of Columbus. Before reporting the organization to the Governor, the directors went to the Bank of Columbus, and were told by Davis, the cashier, that the P. & M. Bank had $230.000 in specie, subject to their control, and some kegs and boxes were shown us, purporting to contain specie. Davis said he had made arrangements with the Insurance Bank for us for $20.000; the directors did not call there. After the new board of directors were elected, one half the stock was called in, and was paid in bills of other suspended banks, $7 or $800 in specie. On 5th February, 1838, $52.000, in bills, were issued; and shortly afterwards, others, to the amount of $250.000. The plates had been procured, and the bills struck off previously, during the first year; no bills issued before that time. Bailey ceased, then, to be a director or stockholder.

A. H. Cooper testified: That the bills now sued on originally belonged to Miller, Ripley & Co.; that Hill, Dawson & Co. received them as agents for Miller, Ripley & Co. They repudiated the act, and tried to hold their agents responsible for the debt. They failed. Gen'l Bailey, as their Counsel, took these bills (five thousand dollars and upwards) for his services in the case. The services were worth about $500.

John Banks testified: That after the specie certificates were delivered to the committee, he called on Mr. Roberts, the cashier of the Insurance Bank, and learned that the specie would not be paid over to the directors, on the certificate; and that therefore, he refused, as a director, to participate farther in the organization.

Other witnesses were sworn, corroborating these.

There was also in evidence the record of the forfeiture of the charter of the Planter's & Mechanic's Bank, on the

ground stated in the information, of its failure to pay specie when demanded for the bills of the said bank.

Counsel for A. E. McDougald, adm'x, &c. requested the Court to charge the Jury as follows:

1st. That if the Jury should believe, from the evidence, that plaintiff's intestate was a stockholder in said bank, owning 1675 shares of stock therein, and that the bills sued on do not exceed his proportionate share of the circulation, and that said Bailey voluntarily redeemed said bills after the failure of said bank, then such bills, so redeemed, cannot be made the foundation of an action against this defendant, under the 11th section of the charter of said bank, and the Jury must find for the defendant.

2d. That if said Bailey was ever a stockholder in said bank, he continued to be such stockholder, as to his liability under said 11th section of said charter, until it is proved by plaintiff that he transferred his stock, and gave sixty days notice of the fact in some public Gazette of this State.

3d. If the Jury shall believe, from the evidence, that in 1837, said bank was illegally organized; that the $250.000 was not, in fact, paid in specie by the stockholders, and that said Bailey, as president, director or stockholder, participated in such illegal organization, then plaintiff cannot maintain this action, and the Jury must find for the defendant.

4th. If the Jury shall believe, from the evidence, that the directors of said bank, in February, 1838, issued and circulated the bills of said bank, without calling in said capital stock, in specie, then such issue was illegal and void; and if said Bailey transferred his stock to said Smith or others, with a knowledge of such intended issue, without a specie basis, and to enable the directors of said bank to make such issue, these plaintiffs cannot maintain this action, and the Jury must find for the defendant. Each and all of which said charges, said Court then and there refused to give; and to which refusal of said Court to give said charges, the defendant then and there, by her Counsel, excepted.

5th. That though no bills may have been issued during the

year 1837, or whilst said Bailey was a stockholder, yet, if said Bailey were a stockholder at any time, and has not been discharged according to the provisions of the charter or other legal ways, said Bailey is liable, under the 11th section of said charter, for the ultimate redemption of the bills subsequently issued.

6th. That if the Jury shall believe, from the evidence, that any persons holding themselves out as directors, president or cashier of said bank, issued the bills or bank notes sued on and mentioned in plaintiff's declaration, before the sum of two hundred and fifty thousand dollars, in specie, had, in fact and in good faith, been paid in, that these said bills or bank notes were and have been issued against the express inhibition contained in said fourth section of the charter of said bank; and that being thus issued contrary to law, said bills or bank notes are utterly null and void, and that no civil liability can or has arisen thereon, in favor of the plaintiffs against this defendant's intestate; and therefore, the plaintiff cannot recover.

7th. That if the Jury believe, from the testimony, that the original subscribers organized the bank by the election of directors, and that the directors issued and put the bills of the bank in circulation before they had actually paid $250.000 in specie, that said election was void, and they had no authority to issue any bills or do any act as directors; and said bills and all other acts done by them are void, and not binding by law on any one, and defendant is not liable.

8th. That if the Jury believe, from the testimony, that Samuel A. Bailey participated and aided in the arrangements to procure the *specie* certificates, instead of having the specie paid in, as required by the charter, and thereby aided in practising a fraud on the law and on the community, that the plaintiff cannot recover on any of the bills issued by the bank in carrying out the fraud.

9th. That if the Jury shall believe, from the evidence, that two hundred and fifty thousand dollars, in specie, was not, by

the original subscribers, and the persons named in the charter, actually and in good faith paid in, but that in the stead thereof, the aforesaid subscibers and persons, by a shift, a device, a scheme, a manœuvre, used paper, termed specie certificates of deposit, made by the Bank of Columbus and the Insurance Bank of Columbus, without ever having deposited in said bank, in specie, the amounts mentioned and specified in said specie certificates of deposit, that then there was and could not be any stock in said Planter's & Mechanic's Bank of Columbus; and that the effort to substitute said certificates of deposit, and the actual substitution of said certificates of deposit, in the place and stead of $250.000 in specie, was and is a fraud upon the law, and contrary to law; and that the act of issuing said bills or bank notes, and the contract by said bank, and by this defendant's intestate, to be liable for their ultimate redemption, is, are and were null and void; and therefore, the plaintiff has no right to recover.

The Court refused to give either of the charges requested, and error has been assigned upon this refusal.

There were other requests and refusals by the Court, but the assignment of errors was confined to those specified above.

Judge BENNING, having been of Counsel, did not preside in this case.

S. JONES, H. COBB and H. HOLT, for plaintiff in error.

W. DOUHERTY, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Was the plaintiff entitled to the charge contained in his first request? We think not; and for this obvious reason: It assumes that the bills upon which the suit was brought, were "voluntarily redeemed" by Bailey, the defendant's intestate, as a stockholder, after the failure of the bank; when the evidence of Mr. Cooper, which is uncontradicted, shows that General Bailey took the bills from his

clients, Miller, Ripley & Co. in the due course of business; that is, as a fee for his professional services, for prosecuting a suit at their instance, against the firm of Hill, Dawson & Co. of the City of Columbus.

[2.] The proposition embraced in the second request, is a correct exposition of the stockholder liability, under the 11th section of the charter of the bank. For it is certainly true, that if S. A. Bailey was, at any time, a stockholder, and had not been discharged according to law, his liability as a stockholder to the bill-holder, still continued.

[3.] This doctrine must be taken, however, with its appropriate qualification. For if he had transferred his stock from that time, he ceased to be a stockholder *inside* of *the charter*, so far as his rights and obligations, as a member of the corporation, were concerned.

[4.] Back of these propositions, lie questions of immense magnitude and practical importance. As for instance, assuming that General Bailey once owned 1675 shares of stock, all of which he had transferred in his life-time, but had failed to give the sixty days' notice thereof, in some public gazette of the State, as required by the Statute; if his proportionate liability to redeem the out-standing circulation of the bank, equalled or exceeded the whole amount of stock so owned and transferred, could his legal representative maintain an action for the recovery of these bills?

My first impressions were, that the retired stockholder might sue. I analogized it to a case of co-partnership; and supposing that the retired partner, who had paid a firm debt, might sue the firm for re-imbursement, and that, too, notwithstanding his continuing liability to third persons. I applied the same rule to these stockholders. But the principle, as to *partners*, is not true. One partner cannot sue another for the re-payment of a past debt of the old firm which he has discharged, and for which he was jointly liable, there being no partnership effects. (*5 B. & Ad.* 936. *Story on Contracts*, 34, *n. j*.) In other words, the firm being insolvent, his right to recover must be founded upon some special con-

tract, and does not result from the general law of partnerships. (5 *M. & Gran.* 759.)

It is true, the charter gives an action against the stockholders, *severally;* thus departing from the Common Law rule as to partners. But I do not see that this alters the principle. It is still the case of one partner suing another, for a debt due from all.

Whatever liability the stockholders are under, must be deduced from the charter. That makes Bailey liable, whether he has transferred his stock or not, provided he has failed to give notice. Is there any agreement, express or implied, that if he has transferred, but failed to give notice, and is compelled to redeem a portion of the circulation, the corporate assets being exhausted, that he may go over upon the other stockholders for contribution? None, we apprehend. Is not his only remedy, then, against his assignee, if against any body? Is not the rule inflexible, that one cannot sue another for the payment of a debt, or the performance of an obligation, for which he is equally bound?

Again, if A, B & C, being co-partners, dissolve, and A retires from the firm, still, he will not thereby exonerate himself from the debt of E, who had previously dealt with the firm, and who had notice of A's retirement. But suppose A were to pay, voluntarily or by compulsion, (which only means a fixed and positive obligation to pay,) this new debt, might he not recover the amount so paid from the firm? And if so, it may be, that were it practicable for the administrator of General Bailey to show that the bills, for the redemption of which the stockholders are liable, were issued subsequent to Bailey's transfer of his stock, would be entitled to sue on the bills held by the estate, under the 11th section of the charter, or individual liability clause.

Before dismissing this branch of the case, I will advert to another topic, germain to the last. Conceding that Billing, as the administrator of Bailey, could not sue on bills up to the amount of his intestate's rateable liability, is he not entitled to maintain an action for the excess over this sum?

It is settled, that the personal liability of the stockholders, under the charter, is at an end when they have paid or been charged with debts to the amount of their *pro rata* share; that they are bound to pay this sum but once; and that whenever they pay this amount voluntarily or by coercion, after having paid it, they may set up this payment as a defence against any further liability.

Now notwithstanding the personal liability of the stockholder for his aliquot part of the outstanding circulation, is there any reason why he should not become a creditor of the other stockholders, for the excess of bills over his proportionate responsibility for contribution?

It is said, that if you allow one stockholder to sue another, that so soon as the defendant has paid the debt, he will then stand as a creditor of the company, and may turn round and recover the same money from the plaintiff; and that thus, the parties might sue each other alternately, to the end of the chapter. But does this preposterous result hold good in relation to the excess which the stockholder has paid over and above his proportionate liability? Does the *reductio ad absurdum* argument apply to him?

We forbear to commit ourselves upon these points. They are, perhaps, legitimately included in both the first and second requests, especially the first. But as we do not find it absolutely necessary to decide them, we prefer their postponement for further discussion.

[5.] The question made by the 4th, 5th, 7th, 15th and 19th requests to charge, (the 8th not being found in the record, and omitted, probably, by the Clerk, in copying the bill of exceptions, but relating, no doubt, to the same subject,) is whether the participation of General Bailey, in the organization of the Bank, was such as to prevent his administrator from recovering upon the bills of which his intestate died possessed?

The capital stock of the Planter's & Mechanic's Bank of Columbus, was one million of dollars. By the second section of the charter, twenty-five per cent. viz: $250.000, was

required to be paid in specie, before any bills could issue. And by the 4th section of the charter, seven directors were to be elected, as soon as the sum of $250.000, in specie, was paid in by the stockholders. And the president, directors and cashier were expressly inhibited from issuing bills until they had, officially and under oath, notified the Governor that the provisions of the charter had been "literally and strictly" complied with. (*Prince*, 125.)

The Act of incorporation was assented to 30th December, 1836. The latter part of April or first of May, 1837, the stockholders met, and the stock was all subscribed for, each taking 188 shares of stock. Instead of paying the $250.000 in specie, some six or seven hundred dollars, only, was thus paid, and the balance of the 25 per cent. was paid, partly in bank bills, partly in checks on the Bank of Columbus, and partly in the notes of the stockholders themselves, having some short time to run. A committee was then appointed by the stockholders, (Hampton S. Smith and S. A. Bailey being two of that committee,) to whom these assets, such as they were, were confided, who made an arrangement with the Bank of Columbus, or rather, with H. B. Davis, the cashier, to give specie certificates for the $250.000—$230.000 of which was on the Bank of Columbus, and $20.000 on the Insurance Bank of Columbus. The committee turned over to the Bank of Columbus the bills, checks and promissory notes paid in by the stockholders. No premium was paid the Bank of Columbus for these specie certificates, although specie, at that time, was worth from two to five per cent. premium. An election was then held for officers, and Smith was chosen president, and Samuel H. Peck, cashier. The certificates were held by the directors for a week or two, when they were returned to the Bank of Columbus, and in lieu thereof, a credit to that amount, in favor of the Planter's & Mechanic's Bank, was entered on the books of the Bank of Columbus. In the month of May Smith resigned, and Samuel Armstrong Bailey was elected in his place.

The president and directors, or some of them, went to the

Bank of Columbus, and made inquiry of Mr. Davis, the cashier, about the specie, who replied, that the specie in the kegs and boxes shown to them was subject to their order, and would be paid on demand. And treating Mr. Davis "with a generous confidence," no money was counted. Indeed, none of the kegs and boxes were opened, and perhaps all were not even seen. No one, certainly, knew whether they contained one dollar; they did not go to the Insurance Bank at all, or see even the kegs and boxes in that bank, or have any assurance from the cashier, that the amount of his certificate was subject to their order, and would be paid on demand, in specie.

It appears, from the testimony of John Banks, that he was one of the committee to whom the specie certificates were delivered, in order to put the bank in operation; that he called upon Mr. Roberts, the cashier of the Insurance Bank, and learned that the specie would not be paid or delivered to the directors on the specie certificate which that bank had given; and the witness states, that in consequence of this, he refused to unite with the other directors in the further proceedings which were had to organize the bank.

The president, General Bailey, then addressed a communication to Governor Schley, dated the 9th of May, 1837, in which he stated, that the provisions of the charter had been "literally and strictly complied with;" that "the sum of $250.000 *in specie*, had been *collected by* and *paid over to us* (the directors) by a committee of the stockholders, and that the same was then at their control at the Bank of Columbus, being deposited there for safe-keeping." And this was sworn to by the president, cashier Peck, and four of the directors, to-wit: Hampton S. Smith, A. B. Ragan, F. C. McKinley and S. R. Bonner—a portion refusing to take the oath.

Notwithstanding the possession of the $250.000 in specie, it was thought inexpedient to commence banking; and it was resolved to loan out the capital stock of the bank (except about 2 per cent. retained for contingent expenses) to the stockholders, or to others, should they decline taking it, upon their notes, properly secured and due the first of October

next thereafter, which was done. And for these notes, checks were given, for corresponding amounts, to each stockholder, on the Bank of Columbus. The Planter's & Mechanic's Bank held these notes of the stockholders, until the second of February, 1838, when a new election was held, agreeably to the provisions of the charter. General McDougald and others were appointed directors, when McDougald was chosen president.

One half of the money loaned, in 1837, to the stockholders, or twelve and a half per cent. on the capital stock, was called in by the new board, which was paid in the bills of other banks, then in a state of suspension; and at the same time, an order was passed to issue $52.000, there then being only about $800 or $1.000 of specie in the bank; and they commenced banking about ten days thereafter. In a short time, $198.000 more were ordered to be issued. And the return made in April, 1838, shows that $250.000 had been issued, up to that time. The next issue was $100.000. The plates had been prepared and the bills struck off, during the administration of General Bailey as president; still, no bills were put in circulation until February, 1838, when General McDougald had succeeded him in that office. Bailey ceased to be either a director or stockholder, after the 5th of February, 1838.

It is unnecessary, for the purposes of this case, to trace the history of this bank further. That it was constituted according to the fundamental provision of the charter, requiring $250.000 in specie to be paid by the subscribers *in limine*, is not pretended. That it was organized against the declared will of the Legislature, in the very face of the law under which it drew its breath, is beyond a doubt. Had the $250.000 in specie, actually been paid in, and deposited specially for safe-keeping, in the vaults of the Columbus and Insurance Banks, I do not deny but that the certificates of their cashiers would have sufficed. But here, no specie was advanced by the subscribers, nor deposited in these banks. As well receive, therefore, any thing else, which an accommoda-

tion, construction would call cash, as the cashier's certificate, furnished under the circumstances, that these were. They were neither specie nor its representative, much less its equivalent; consequently, one cannot hesitate, upon reading the evidence in the record, to pronounce the whole transaction a mere evasion of the charter.

[6.] It is needless to quote the authority of this or any other Court, in support of the doctrine, that no one shall derive a benefit from the violation of the law; or what, in legal effect, is the same thing, from a fraud practised by himself or others, to his own advantage. This is unquestionably the rule of the Common and Civil as well as the Moral Law. No polluted hands shall touch the pure fountains of justice, is a maxim in all law. And the simple question is, was the participation of General Bailey in those preparatory, illegal, we will not say fraudulent, proceedings, such as to prevent his administrator from maintaining this action?

It is urged, that General Bailey had dissolved his connection with this bank, both as president and stockholder, before a single bill was issued and circulated. And this is true. He was not in "at the death," therefore. But was he not the "avant courier" of this financial enterprize? The *alpha*, if not the *omega* of a monetary project, terminating, in a few years, in wide-spread mischief and ruin? He may be less culpable than others who aided and abetted, from the beginning to the end, *ab ovo usque ad mala;* still, was he altogether guiltless? He and others put the ball in motion. He gave it a tremendous shove the 9th of May, 1837, when as president, he notified the Governor, under his official oath, that "the sum of $250.000, in specie, had been *collected of the subscribers*, and paid over to the directors, by a committee of the stockholders, and that the same was then at their control in the Bank of Columbus, *being there deposited for safe-keeping.*" And that the provisions of the charter, requiring this to be done, before any bills could be issued, had been "strictly and literally complied with."

Without this report to the Executive, no bills could or would have been issued; with it, there was nothing to hinder. And however conscientious the General may have been in making this statement—and I would be the last man living to impeach his sincerity—it is not altogether certain that a substitute could have been found to take his place and perform this service. It is in proof that a portion of the directors declined in uniting in this representation. And now that the banking mania has subsided, and we contemplate, coolly, the difficulty and distress which it occasioned, we are not astonished at the scruples of those who refused to participate in these extraordinary measures.

After all, I do not understand this halving and quartering a violation of the law. In law as in morals, he who is guilty in part, is guilty of the whole. It would be like the case mentioned in Tristam Shandy, of the Abbess and the Nun, where it was necessary to pronounce a certain criminal word to make their mules move with their carriage; it would have been a sin for either of them to utter the entire word, but they divided it into two parts; one articulated one part, and the other the other; and thus, effected their purpose and avoided all the sin of the expression. Men break and enter a house, with intent to commit a felony. One, after entering, immaterial for what cause, stops short, but the others proceed to consummate the original design, are not the whole guilty of burglary? One ships goods to the coast, with a view to import them contrary to the Revenue Laws, and sells out to his confederates, who actually introduces them. Are they not all smugglers?

I protest against being understood as intending to be offensive in the employment of these comparisons. I use them only as apt illustrations of the principle I wish to enforce; for I am fully persuaded, in my own mind, that the organization of this bank is not tainted with that moral turpitude which is generally ascribed to it; and which I am bound, in candor, to say, appearances would indicate.

There is one other view of this subject, which is entitled to

some consideration. General Bailey was one of the corporators to whom this charter was granted. (*Prince*, 124.) It appears, from the testimony of Ragan, that there was distributed to him 188 shares of the stock. On that, he was bound, by the charter, to pay twenty-five per cent. or $4.700 in specie. He was one of the committee to whom the money was paid, if paid at all; and who knew the fact, if it was not. Did he pay it? Did he deposit it in the Bank of Columbus? The testimony puts this matter beyond cavil. The specie was not paid—was not deposited.

Here is proof positive, then, not only that the charter was wounded in this vital provision, *but that General Bailey knew it*. And yet, he takes the initiatory steps in organizing the bank; and having done this, transfers his stock to enable his successors to finish the work which he had begun; and it may be, that he sells to advantage, because of what was done. And now, his administrator comes into a Court of Justice and asks its aid, to make the stockholders (of whom, so far as liability for redemption is concerned, he is one,) personally responsible for the bills which his intestate had obtained at a great depreciation!

We are clear that the action cannot be maintained; the issuing of these bills, resulting as it did, directly from the previous unlawful acts of the plaintiff's intestate. And we say to him, and to all such, in the language of the classical quotation adopted by old Chief Justice *Wilmot*, in *Collins against Blantern*, (2 *Wilson*, 347,) "*Procul, O procul este profani.*"

[7.] We come now to the last assignment of error. It is predicated upon the refusal of the Court to give the charges set forth in the 10th 12th, and 17th requests.

The substance of the position occupied by the plaintiff in error, is this: That the bank, having been illegally organized on account of the failure of the subscribers to pay, *bona fide*, in advance, the sum of $250.000 in specie, as required by the fourth section of the charter, the election of directors, and the issuing of notes by them, as well as every other act done, or contract made by the said bank, was illegal and

void; and that, consequently, no cause of action could accrue to the administrator of Bailey, upon the bills held by his intestate.

We controvert this proposition; and hold the following to be the true doctrine: That, conceding the bank to have been organized, and the bills issued without the actual payment of the $250.000 in specie, required by the charter; and that, by reason thereof, the State might, at any time, have re-called its corporate franchises; or a stockholder have resisted the payment of stock; or a debtor his liability to the bank, provided the rights of third persons were not prejudiced; still, it is a valid corporation, so far as to make it liable to creditors for its own acts, and its stockholders liable to bill-holders, under the 11th section of the charter for the ultimate redemption of the bills put in circulation by the bank.

I should regret, exceedingly, to find that we were chained down, by law, to hold any other doctrine than this. I want no case to support it, it is so obviously right in itself. It is enough for me, if there be no controlling authority against it. And I am quite sure there is not. We would not stir a single pebble of the law, or pervert a tittle thereof. I have examined, carefully, all the precedents referred to by Counsel, and while it is true that there are detached passages in some of the opinions or general expressions used, which, taken by themselves, are susceptible of the construction imputed to them; yet, by looking at the exact case under consideration at the time, and taking the whole opinion together in all its bearings, it could be easily shown that no such judgment was intended to be given by the Court, as would support the opposite opinion.

My first thought was to review the authorities cited by Counsel for the plaintiff in error; but the space occupied in our Reports by these bank cases, has become the subject of serious complaint by the profession, not immediately interested in this litigation; (the continuation of which is so prejudicial to the financial reputation, and consequently, the commercial prosperity of the City of Columbus;) I shall there-

fore pretermit my purpose, at least for the present. Should the cases relied on be re-produced to the same point, as authorities have been on other occasions, I may be forced, as heretofore, to discharge this duty.

But suppose it be true, as it is not, that neither the corporation, itself, nor the bill-holders are liable, because of the illegal organization of the bank, was it not competent for the State, the other party to the contract, to relax any or all of the provisions inserted, for the protection of the public? In that event, although the $250.000 was a condition precedent to the existence of the corporation, still, if the State, representing the people, saw fit to permit the bank to exercise the charter privileges conferred upon it, notwithstanding this omission, she had a perfect right to do so. And it is not for the other party to complain. If the State did not desire or seek to avoid the charter on account of this omission, misconstruction of the law, fraud, or whatever else you please to call it, the other party cannot be heard nor treated as absolved from the performance of their obligations.

It seems, then, that in December, 1840, the Legislature passed an Act to cause judicial proceedings to be instituted against several defaulting banks, which had failed to redeem their bills in specie. (*Cobb's Dig.* 115.) In December, 1841, another Act was passed to arrest these proceedings, provided the banks, implicated, should resume and continue specie payments, on and after the first day of January next ensuing, and pay all costs which had accrued, and the Attorney's fees. (*Ib.* 117.) In December, 1842, these banks having failed to comply with the conditions imposed by the Act of 1841, an Act was passed, making provision for the appointment of receivers upon judgments of forfeiture being rendered, to take charge of the assets of these corporations, and to wind up their offices. In none of these Acts were the banks named, to which their provisions were made applicable. But by the Act of 1843, (*Ib.* 120–'1,) it is made manifest that the previous litigation referred to, was intended for the Planter's & Mechanic's Bank of Columbus, amongst others. Indeed, the

judical records of the country, as well as the history of the times, leaves no doubt as to a matter that is not questioned.

Here, then, we have, in 1841, a re-affirmance of the charter granted to this corporation; in which, it is solemnly stipulated by the State, that notwithstanding the failure on the part of the stockholders to pay the $250.000 in specie, required by the charter, or any other default; still, the bank may continue to exercise all the rights originally granted, provided it would resume and continue specie payments at the beginning of the following year. Had this been done, the faith of the Government was pledged, that the past should be forgiven. It was, to all intents and purposes, a Statute-pardon. An assignment having been made by this bank to Robert B. Alexander, under the Act of 1841, it is ratified by the Act of 1843, and declared valid for all purposes, both in Law and in Equity. Proceedings have been had under this assignment from that day to this; and it has never occurred to any one to attack the assignment, upon the ground of the incapacity of the bank to make it.

When the information, in the nature of a *quo warranto*, was filed against this bank by Col. John H. Watson, as the Solicitor General of the Chattahoochee Circuit, to forfeit its charter, what is the gravamen of the complaint? Not the failure to pay the $250.000 in specie; no, that is not mentioned; but the charge brought against the corporation is, that "one James M. Wesson, on the twenty-third day of June, 1841, presented a five dollar bill, issued by said bank, at its counter, and demanded payment in gold or silver, which was then and there refused!" And it was for this that the "liberties, privileges and franchises" of the Planter's & Mechanic's Bank of Columbus, were seized and reclaimed by the State. It was born—lived some five years, issuing bills, selling exchange, and performing all the ordinary functions of a bank, and died; or rather, was executed, and no allusion was ever made to the failure to pay the twenty-five per cent. in specie, on the capital stock!

And, yet, we are now gravely told, that no such corpora-

tion as the Planter's & Mechanic's Bank of Columbus ever existed; or was capable, in law, of issuing bills, or otherwise contracting, or being contracted with. That it was a phantom bank! That all this Legislation, directing its charter to be forfeited for refusing to redeem its bills in specie; for the ratification of the appointment of a receiver by the bank, and for the collection and distribution of its assets, was a farce.

Such an idea is as repugnant to law as it is to natural justice and that good faith, which it is one great object and design of Courts of Justice to compel the observance of. It would as ill comport with the honor and dignity of the State, as it would be grossly and cruelly unjust to third persons, under such circumstances, that this charter should be pronounced void, on the ground of the original illegality in the organization of the bank. The State has never complained of this injury; but it is sought to be taken advantage of by those whose only complaint is, the disobedience to the law on the part of the stockholders themselves. "Neither the public interest nor public policy, nor regard for public morals, demand such vengeance to be inflicted on the public themselves; no such sacrifice of innocent victims, to appease the indignant spirit of a broken law." (*Per Duncan J.* 8. *S. & R.* 219.)

The corporation, itself, then, being clearly estopped, as is not strenuously controverted by a portion, at least, of the very able Counsel who have argued this cause, and that, too, upon Common Law principles, independent of the statutory ground upon which I have mainly rested this opinion, can the stockholders set up this defence against the bill-holders? We think not; and for reasons which we shall offer, apart from their long acquiescence in the re-affirmance of the charter, upon the single term proposed by the State, namely: the resumption of specie payments; an obligation binding upon the bank *ab initio;* and which did not need any supervenient legislation to create.

If a corporation may contract by promise, express or implied—also, by assent and acquiescence, why may not the

ratification of the stockholders be presumed, by suffering time to elapse, during which they ought to have dissented. (1 *W. & S.* 101. 12 *Wheaton*, 73.)

The argument in behalf of the bill-holders, is briefly this: "We grant, that under the 11th section of the charter, the persons and property of the stockholders are bound for the redemption of the bills and notes issued by the bank; but it is only for such bills and notes as are thus issued, and not for such as may be issued by others, contrary to law; that the directors are the agents of the corporation, but not of the stockholders; and although the bank may be made liable, the stockholders did not undertake to redeem all the bills and notes for which the bank might be made liable, but only such as the bank issued."

[8.] It is not denied, and if it is, the books are full to the point, that the directors are the agents of the bank, and that they are clothed with authority to issue bills. This being assumed, let us ascertain to what extent the bank is bound by the acts of the directors.

The general rule upon this subject is, that every principal is held liable to third persons in a civil suit, for the frauds, deceits, concealments, misrepresentations, torts, negligences or other malfeasances and omissions of duty of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct; or even if he forbade or disapproved them. (*Story on Agency*, §452.)

In every such case, the principal holds out his agent as fit to be trusted; and thereby, in effect, warrants his fidelity and good conduct, in all matters of the agency.

[9.] The doctrine, that a corporation can only, through its agents, do *right*, and is not responsible for their *wrongs*, is exploded. (9 *S. & R.* 94. 16 *East.* 6. 5 *Wheaton*, 326.)

[10.] Again: The authority of the cashier or directors to bind the bank, is just such as these officers are held out to the public, by the charter, to possess, according to the general usage, practice and course of business of such institu-

tions; and their acts, respectively, within the scope of such usage, practice and course of business, binds the bank in favor of third persons having no knowledge to the contrary. (*Story on Agency*, §114.)

This charter holds out the directors to the public to possess the power, according to the general usage, practice and course of business in banks, to issue bills. These bills were issued within the scope of such usage, practice and course of business; consequently, the bank is bound, notwithstanding an over-issue, to redeem the bills thus put into circulation.

[11.] For it is well established, that where one of two innocent persons are to suffer from the tortious act of a third, he who gave the aggressor the means of doing the wrong, must alone bear the consequences of the act.

[12.] With these guiding rules before us, we insist, that beyond all doubt, the Planter's and Mechanic's Bank of Columbus were liable for the redemption of the bills issued by order of the directors, whatever the amount might be. They were the agents of the bank, to issue bills. They acted within the scope of their authority, and the course of their employment. Their misconduct, therefore, cannot shield the bank from liability to bill-holders, who were ignorant of such misfeasance. The corporation held out the directors as fit to be trusted; and thereby, impliedly warranted their fidelity in the discharge of their duty.

Were the directors of a rail road company, having no banking privileges, to issue bills, the public would take them at their peril; no liability would attach to the company, because no such power was designated by the charter. Not so, however, with a banking company. Here the right to issue bills is conferred upon the corporation, and through it, upon the directors; and whether they make an over-issue or not, cannot be known to strangers. In the one case, the directors are guilty of a usurpation of power; in the other, of an abuse of it only.

Upon the same principle, the case of *Coleman against the*

Representatives of Bulloch and Wells, cited by Col. Jones, as having been decided by the Judges in convention, may be justified. It was a suit to recover 'change bills, the issuing of which were forbidden by law, under a penalty. No one could claim to be the innocent holder of such bills, because every person is bound to know the public law. So of the case of *Craig et al. vs. The State of Missouri*, (4 *Peters*, 410,) which the senior Counsel considers the same *ad unguem* to the one at bar. And what was the judgment of the Supreme Court; or rather of the majority of that bench, some of its ablest members dissenting? Why, that a promissory note, given for certificates issued at the loan office, and payable to the State of Missouri, was void, because those certificates issued under an Act of the Legislature, were "bills of credit;" and therefore, that their emission was prohibited by the Constitution of the United States, which declares that no State shall "emit bills of credit."

Who does not see, at a glance, the difference between all this class of cases, (and from such and elementary *dicta* to the same purport, the briefs of Counsel are made up,) and that under consideration? They are as wide as the poles apart. In the one instance, every man can read the charter, public law or Constitution, and determine, for himself, what is legal and what not. And all the community stand upon the same footing, in this respect. But who can know, except the stockholders themselves, whether the $250.000 was paid in specie. Or whether the bills issued by the bank at any given period, exceed three times the amount of the capital stock actually paid in? The idea, that he who takes the bills of the bank is to lose his property which he has honestly parted with, because the stockholders or the bank have not done their duty to themselves, is unreasonable to the last degree. It seems strange, indeed, and sounds strange, to an unsophisticated ear. No precedent has been found, I feel quite confident, none can be, to sustain such a doctrine.

[13.] Such, then, being the nature and extent of the liability of the bank, how does it affect the stockholders? To

solve this inquiry, we must look to the terms of the charter itself, for it is not pretended that the directors are the agents of the stockholders. The stockholders are not responsible for the misconduct of the directors, unless they have agreed to make themselves so.

By the 11th section of the charter, it is stipulated and agreed, by and between the State of Georgia on the one part, and the present and prospective stockholders of this corporation on the other part, in consideration of the franchise granted, that amongst other things, as greater security to the public, the persons and property of the stockholders should be pledged and held bound, in proportion to the amount of shares and value thereof, that each individual or corporation might hold in said bank, for the ultimate redemption of the bills or notes *issued by said bank*. (*Prince*, 127.) To uphold the argument, how important for the stockholders that it should have been inserted, "provided the $250.000 in specie, required by the charter to be paid in by us, the stockholders, be paid before any directors are elected or bills issued by the bank; and provided, also, the circulation does not exceed three times the amount of the capital stock actually paid in."

This is plain—the general law of agency makes the bank liable for the bills; and the stockholders have made themselves so, by their express agreement. Were these bills *issued by the bank*, viz: by the directors, who were the agents of the company to issue bills? If so, the stockholders have stipulated, that if the corporation is unable to redeem them, they will. But for this guaranty, the charter, probably, would not have been granted. We have good reason to believe this, seeing, as we do, that similar security was super-added to every other cotemporaneous bank charter. The public have a right, then, to look to it and demand its execution, in their behalf. The contingency having happened upon which this additional remedy accrued, to-wit: the insolvency of the corporation, the people are entitled to look to this ultimate redress.

Only settle that these bills were "*issued by the bank*," and

the controversy is at an end. Were they not so issued? If not, by whom, pray, were they issued? Did the bank, before its dissolution, or its assignee, since, in the numerous suits instituted upon their bills, ever repudiate them? Have not judgments been uniformly recovered against the bank, upon these bills? Has the bank, by plea, ever repudiated the act of the directors, in this respect? After the authoritative recognition of the defence here set up, and enunciation of it, there would be found few rational persons dealing with banks. It would destroy public confidence and shake the foundation of paper currency, by sweeping away, at once, every substantial liability of monied corporations, and leave all persons, unwise enough to deal with them, at the mercy of every faithless officer in their employment. To quiet the community, and to maintain and uphold the best interests of society, we proclaim, that no such doctrine exists.

We have ever looked to the plain and obvious meaning of the charter, itself, for our guidance in these bank cases. By this means, we steered safely between the projecting shores, when these questions were new to us. Time, reflection, re-examination, and the judgment of the highest Judicial authority, have approved our course. We shall look steadily to the charter in time to come. It is its own best expositor; and whether we decide according to its letter or spirit and reason, we are equally clear, that these stockholders are liable to redeem all the bills issued by the bank, whether there be many or few—one million or three million of dollars, provided there be no corporate effects out of which the creditor can be satisfied.

I *profess* no sympathy for the parties in this endless litigation; and I sincerely trust, that in our future discussion, no extrinsic appeals of this sort may be deemed necessary, by Counsel, in discharging their duty to their clients. There are, or were, many unfortunate bill-holders, who have sustained heavy loss, and have realized nothing from the scattered fragments of this broken bank; and, on the other hand, there are stockholders, or their surviving families, who have

been beggared by the mal-administration of this institution. We feel for all, and for all alike. But these considerations can have no influence with this or any other Court, in adjudicating positive law. Placing all upon the same level, and disregarding all private griefs and grievances, which had better be indulged any where else than here, we shall endeavor, in the exercise of an independent judgment, to hold the scales in equipoise, looking alone to the laws of the land.

No. 56.—LEROY NAPIER *et al.* plaintiffs in error, *vs.* JOHN H. HOWARD *et al.* defendants in error.

[1.] If a verdict be rendered by a special Jury in a Court of Equity, finding that certain property should be settled on a married woman and her children, but the decree is not formally and accurately framed, so as clearly to provide for such settlement, the Court may afterwards, and after the death of the wife, upon proper issues formed, and whilst it still has the fund under its control, perfect the decree, and do rightly what was intended to be done. To this end, an amendment may be admitted to a bill filed, making creditors of the husband parties to the proceeding, in order that they may be heard against it, if they so desire.

In Equity, in Stewart Superior Court. Decision by Judge WORRELL, April Term, 1855.

Thomas Napier, by his will, bequeathed certain property to trustees for his son, Thomas T. his wife and his children. James L. Delaunay married one of the children. The trustees loaned him a part of the trust funds, and took two mortgages to secure the re-payment thereof. Prior to the mortgages, certain judgments had been recovered against Delaunay. Subsequent to the mortgages, other judgments were recovered, upon some of which John H. Howard was surety.

The trustees (the mortgagees) filed a bill against Howard and others, alleging that Howard had taken up or fraudulently colluded with the older judgment *fi. fas.* by means of which he was proceeding to sell, under the younger *fi. fas.* all the property not included in the mortgages, and was reserving the older *fi. fas.* to sell the property included in the mortgage. This was the substance of the bill. The prayer was for an injunction, &c. Subsequently, Howard filed a bill, alleging that under the will of Thomas Napier, the funds loaned by the trustees to Delaunay, were really the property of Delaunay, and that the mortgages were fraudulently made and kept open for the purpose of defrauding the creditors of Delaunay. The prayer was for an injunction of the mortgage *fi. fas.* and a distribution to Delaunay, of his share of the property or money bequeathed as aforesaid.

On a writ of error to the Supreme Court, they decided that the children of Thomas T. Napier, as they arrived at age, were entitled to a share of the property bequeathed, and directed an inquiry, in the Superior Court, as to the amount of the trust property; and farther, "what would be a suitable provision to be made for the support and maintenance of Mrs. Sarah C. Delaunay and her children, if any, out of her share of said trust property, including the whole, or such portion thereof as may be deemed equitable and just, and that the same be decreed to her for her maintenance and support, as well as for the maintenance and support, and education of her children, if any, and the balance, if any, be appropriated to the debts," &c.

Upon a trial, the Jury found and decreed, that Mrs. Delaunay's share of this trust fund, viz: $10.074, "would be a suitable provision for her and her children."

From this decree Howard appealed, and the second Jury found the same verdict. Upon these verdicts, no regular decree was entered by the Court.

Subsequently, Mrs. Delaunay died.

At the April Term, 1855, John Tolbert, Otis Childs and Benjamin T. Bethune, judgment creditors of Delaunay, ap-

plied to the Court to be made parties complainant to the bill of John H. Howard; and an amendment was proposed, by which the bill would be made a general creditor's bill. The amendment set forth the death of Mrs. Delannay, and claimed, that upon her death, her husband became her sole heir, and was entitled to all of the trust fund settled upon her, &c.

The Court below allowed the amendment, and this is the decision assigned as error in this Court.

WELLBORN and J. JOHNSON, for plaintiffs.

B. K. HARRISON and S. JONES, for defendants.

Judge BENNING, having been of Counsel in this case, did not preside.

By the Court.—STARNES, J. delivering the opinion.

We are of opinion, that the amendment submitted should have been received. And this opinion is intended to be expressed, without prejudice to the rights of the children of Mrs. Delaunay, who are interested in the decision which has been made, for the purpose of settling this property on Mrs. Delaunay and her children.

It seems to have been the intention of the Court and Jury which tried this case, to make a permanent settlement of this property, not only upon Mrs. Delaunay, for life, but upon her children—yet, the form of the settlement; that is to say, the verdict of the Jury and the decree entered thereon, are not sufficiently technical and accurate in the terms employed, so as clearly to carry into effect this intention, and thus constitute the fund a provision for Mrs. Delaunay during life, and for her children after her death.

Still, if this be what was intended to be done, it is not too late for a Court of Equity to perfect or do rightly, what it has undertaken to do in this behalf, with respect to a fund which it still has under its control. But as the question, in

this point of view, seems not to have been argued in the Court below, and was not carefully discussed before us, and as we are anxious that all parties, who may so desire, should be heard upon it; and being, ourselves, also willing to be further advised, we therefore affirm the judgment, directing the amendment to be received—suggesting that the children of Mrs. Delaunay may be permitted to ask that a formal and proper settlement of this fund be made upon them, and that the Court below do try and determine the issues so formed.

No. 57.—WELLS SMITH and another, plaintiffs in error, vs. W. S. BROOKS, defendant in error.

[1.] Parol evidence may be admitted, to show that the payee of a promissory note is fraudulently enforcing the same against the maker, after the consideration has failed.

Complaint, in Marion Superior Court. Tried before Judge POWERS, February Term, 1855.

This was an action on a promissory note for $400. Wells Smith and William Walker, the makers, pleaded, 1st—a partial failure of consideration in this: that the note was given for the hire of a negro mechanic; and it was agreed, at the time, that if the negro died during the year, that there should be a *pro rata* deduction from the hire; and that the negro died after the expiration of four months. 2d. That at the time of the hiring of said negro, plaintiff undertook, and warranted the said negro to live during the year for which he was hired, &c. On motion, the Court struck out these pleas, and refused to hear all evidence offered in support of them.

This is the error assigned in this case.

BLANDFORD; S. HALL, for plaintiff in error.

COOK & MONTFORT, represented by HAWKINS, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] The pleas which were stricken out in this case, set up a defence, a partial failure of the consideration for which the te was given, by the death of the slave for whose hire it was part given, and by the plaintiff's withdrawal of the cksmith tools, which went along with the slave, as a part the consideration. And the evidence of John B. Smith, ich was rejected, was offered to sustain these pleas.

It is true, that the note in question purported to be for *lue received.* And this evidence was offered for the purse of showing that value *had not been received,* by reason the fact, that the true contract between the parties was, at if the slave died before the year for which he was hired d expired, a deduction was to be made from the note, proortioned to the time of service thus lost to the hirer. But e admissibility of the evidence was put upon the ground of failure of the consideration—not a failure of considera-n, because of the single fact, that the slave had died before e end of the year, but because this contingency had been ntemplated, and provision made for it, in an agreement, at if he did so die, a deduction should be made accordingly. And if such deduction be not now made, that it will operate a fraud upon the hirer and maker of the note.

Courts of Justice have gone very far to sustain pleas of nt of consideration and failure of consideration, in cases of it upon promissory notes, especially as between the origi-l parties; and have manifested a strong disposition to rule, at when the written contract has been entered into, with the derstanding that it is to be used in a particular way, or

with a particular qualification; it is a fraud to violate this understanding, and parol testimony may be admitted to explain the contract.

This rule should be applied only to contemporaneous evidence, it seems. (*Bollinger vs. Eckhert*, 16 *Serj. & R.* 424. *Hurst vs. Kirkbride*, 1 *Binn.* 616. *Oliver vs. Oliver*, 4 *Raw.* 141. *Hulse vs. Wright*, 6 *Serj. & R.* 345. *Barker vs. Prentiss*, 6 *Mass.* 430. *Stackpole vs. Arnold*, 11 *Mass.* 27. *McInstry vs. Pearsall*, 3 *Ir.* 319. *Tobey vs. Barber*, 5 *Ir.* 68. *Putnam vs Lewis*, 8 *Ir.* 389.)

In this case, therefore, looking upon these as pleas which allege a failure of the consideration for which this note was given, and a fraud on the part of the payee, we think this evidence might have been admitted; and we reverse the judgment, because the pleas were stricken out and the evidence not received.

Such are the views which this Court entertained at the hearing of the cause. I was not satisfied with them at the time, but acquiesced, because the pressure of our duties would not allow of such further examination of the subject as I desired to make, before expressing any other opinion; and because I know that Courts of Justice in our State had, for a long period, held, that the admission of parol testimony, to sustain a plea of failure of consideration, in cases of contracts by promissory notes, was not a violation of the Common Law rule, which declared that parol testimony should not be admitted to vary, alter or contradict the terms of a written instrument. I was not satisfied with the reasons given for this, but, under the circumstances, I hesitated to adopt a different rule.

These reasons are not in harmony with Common Law principles. The effort is made to reconcile them with Common Law rules, by holding, that "if the real contract of the parties is not expressed in writing, this must arise from mistake or fraud," (*Bollinger vs. Eckhart*, 16 *Serj. & R.* 424,) and that parol testimony is admissible to assail a written agreement, where there is mistake or fraud. This is true where the mistake or fraud is present, and enters into the execution of

he contract, and by reason thereof, the same does not express he real agreement and understanding of the parties. But he rule cannot be held applicable to any case where the hol- er, in his effort to enforce the written contract, or the oppo- ite party when resisting it, puts a different construction upon ; from that of his adversary. If this be so, any maker of uch a contract has but to plead that the true tenor of the ritten contract, which is being enforced against him, is dif- erent from what is alleged; that something else was under- tood between the parties, at the time, different in import; nd that the person who sues, in not setting this forth, is *taking a fraudulent use* of the instrument; and then he ay introduce parol testimony to sustain his case.

It is easy to see that such a rule as this, in all cases where he maker of the instrument chose to set up such a defence, ould open the door and let in the mischief which the Com- on Law rule was intended to prevent, would, in effect, com- letely emasculate that rule; and would, practically, break own that barrier which the experience of ages has erected gainst the weakness of memory and the wickedness of men.

I cannot, therefore, adopt this reasoning, and feel con- trained to say, that if an exception to the rule above men- ioned, in cases of failure of consideration, pleaded to actions n promissory notes, is demanded by the exigencies of trade nd commerce, legislation should be invoked to provide such n exception.

No. 58.—Ann E. McDougald, adm'x, &c: plaintiff in error, *vs.* Richard A. Lane, defendant in error.

[1.] The Act of 1850, entitled "an Act to regulate the testimony of Attorneys at law," does not prohibit the testimony of an Attorney, where the information which is sought, was not necessarily "a matter or thing acquired from his client, or during the existence, *and by reason of the relationship* of client and Attorney."

[2.] Where the charter of a bank required that twenty-five per cent. in specie, of the capital stock subscribed, should be paid before the board of directors should proceed to issue their notes, and this was never done, but the board, disregarding it, issued notes, some of which came into the hands of a party who brought suit upon them against a stockholder, who by a provision in the charter, was made ultimately liable, upon the failure of the bank to pay: *Held*, that if the action were against the corporation, by an innocent bill-holder, it could not be allowed to plead (and would be estopped from denying) that there had been a compliance with the terms of the charter, or that the bank had never been legally organized, had no authority to contract, and that its bills were consequently void; and that if the bank would thus be held liable, as the liability of the stockholder, upon failure of the corporation's assets was incidental to that of the bank, the stockholder must be held liable, and cannot avail himself of such a plea.

[3.] The liability of the stockholder in such a case, is not secondary and collateral to that of the directors for an excess of issue, where the charter provides, that "in case of excess, the directors under whose administration it shall happen, shall be liable for the same, in their private and individual capacities, and may be sued for the same in any Court of Record in the U. S." &c. But the stockholder's liability is joint and several with the director; and it is not necessary that the latter should be first sued to insolvency.

[4.] Where, in such a case, against a stockholder, an exemplification of the record of the case first brought against the bank, was offered as evidence of the identity of the bills upon which suit was brought: *Held*, that such exemplification, taken in connection with other circumstances in the case, and especially with the fact, that the notes sued upon in the last case came from the custody of the Attorney of record in the former case, afforded *some* presumptive evidence of that identity.

[5.] If the bill-holder in such a case participated in the fraudulent organization of the bank, and knew that the twenty-five per cent. in specie had never been paid in, and if he were concerned in making a fraudulent and deceptive return to the Governer, so as to enable the directors of said bank to issue notes, a Court of Justice will not lend him its aid to recover the bills in his hands.

[6.] The defendant's Attorney is not entitled to an order, requiring the bills sued upon to be deposited in Court until after final judgment, or payment of the same.

Debt, in Muscogee Superior Court. Tried before Judge WORRELL, December Term, 1854.

This was a suit by a bill-holder against a stockholder, in the Planter's & Mechanic's Bank of Columbus, to enforce the liability to redeem sundry bills sued on, amounting to $1900.

The defendant moved the Court to dismiss plaintiff's suit, on the ground that certain interrogatories which had been propounded to the plaintiff, and allowed and ordered, by the Court, to be answered, had not been answered by the plaintiff, and produced the original interrogatories, with an entry made on the same by H. J. Devon, Attorney for the defendant, dated the 22d of March, 1853; that he had served a true copy of the within interrogatories and notice, on Wm. Dougherty, the Attorney for plaintiff. It was also proved to the Court, that the plaintiff did not reside in the Co. of Muscogee, and that Devon was dead. The Court did not consider this sufficient evidence of service. Defendant then offered Mr. Dougherty as a witness, to prove a copy of the interrogatories was left at his office more than 60 days before the present term of this Court. To which Dougherty, as Attorney for plaintiff, objected to testifying. The objection was sustained by the Court, and the defendant excepted.

The plaintiff, before submitting his cause to the Jury, demurred to certain pleas filed by the defendant, marked and distinguished as Nos. 4, 6 and 7, which pleas were as follows: No. 4. That the bills sued on are void, because the stockholders never paid in the 25 per cent. in specie, as required by the charter. No. 6. That the plaintiff and his Attorney had made an illegal agreement, by which the Attorney was to pay all costs and receive one half of recovery for his services. No. 7. That the whole of the bills sued on were an excessive issue by the directors, and that under the charter,

the stockholders, if liable at all for them, were only ultimately liable, after the personal liability of the directors was exhausted; which demurrers were severally sustained by the Court; and thereupon, the defendant excepted.

The plaintiff introduced A. B. RAGAN as a witness, and proved that the signature of certain bank bills shown, as declared in his declaration, against this defendant, were genuine, and that the persons purporting to sign them as president and cashier, were acting as such at the date of said bills. Said Ragan also proved, that in February or March, 1837, the stockholders, or some of them, met for the purpose of organizing the P. & M. Bank. Some paid in specie—not a large amount—some paid in bills of the banks of the State, and some made notes, indorsed to the satisfaction of the Bank of Columbus. They appointed Gen. S. A. Bailey, John Banks and H. S. Smith a committee, to take charge of what the stockholders had paid in, and make an arrangement with the cashier of the Bank of Columbus about specie; that said committee reported that they had made an arrangement with A. B. Davis, cashier of said bank, and that he would give them a specie certificate of deposit; that the stockholders then proceeded to the election of directors, of whom S. A. Bailey, John Banks and himself were three, and he believed Mr. Gold McKinley and Bonner were the others; that said directors then elected H. S. Smith president, and Peck cashier; that Peck was not present, and witness acted as cashier.

Ragan further testified: That after organizing, they did not do any business. In May following, 1837, Smith resigned his appointment as president, and S. A. Bailey was then elected president. After his election, the president and several of the directors, and he among them, went to the Bank of Columbus and asked for the specie, and Davis told them that the kegs and boxes he showed them contained about $230.000, and that he, Davis, had procured them a certificate of specie deposit from the cashier of the Insurance Bank, for the balance, about $20.000, to make up the sum of

0.000; that said Davis told them the said specie was at the rol and order of the said P. & M. Bank, and might be taken y by them; that said directors did not go to the Insurance k, to demand or make any inquiry for the specie in that k, but took the word of said Davis for it. The defendant cted to giving the statements of the said Davis in evi- ce; which objection was over-ruled, and defendant ex- ed.

Witness further testified: There was no examination made hem, to ascertain if the kegs and boxes did contain spe- and no count was made to see how much there was, but e satisfied with the statements of Davis, that they did con- specie, and also as to the amount. And the said witness ified, that they then retired, and the directors had a meet- and determined to do no banking business, and passed an r to loan out the money to the stockholders; and if they not want it, to loan it out to others, except about $2.000, h was retained to pay expenses; that the stockholders erally borrowed the money; that when the stock or shares e subscribed for, only one firm, Kelber & Watkins, of eta County, paid in about 6 or 700 dollars in specie. e of the rest paid in their subscriptions in bills of other ks, but most of them in promissory notes, discounted by banks of Columbus, which were put under the control of committee. The witness, who acted as cashier, gave to n who borrowed from the P. & M. Bank, checks on the k of Columbus; he did not hear of any demanding specie, one man, and the bank refused to pay him specie. Wit- did not hear why the bank refused. The matter was promised, by paying Central Bank bills, which were at a ount, but witness did not recollect how much. The di- ors determined no bills should be issued in 1837, because bank thought, that in the condition of the country, bank- could not be made profitable, and none were issued until 8. In February, 1838, agreeably to the charter, the an- l election came on for directors, and H. S. Smith, D. Mc- gald, M. W. Deny, John Banks, Hiram Reid and others,

were elected directors, and McDougald was elected president. An order was then passed, that the stockholders who had borrowed of the bank the preceding year, should reduce their debts by paying in one half. Those who complied, did so by paying in, mostly, the notes of suspended banks—very little specie was paid in—not more than $800 or $1.000. The new stockholders, among whom was McDougald, put in their notes in the place of those from whom they purchased. The board of directors then ordered about $250.000 of bills to be issued. Order to issue means preparing the bills, for circulation. The largest portion of the bills were put in circulation, but could not tell how much; could not identify any of the bills shown or put in circulation; has no reason to believe they were put in circulation, but that they are now shown to him. Many of the bills put in circulation, were returned and re-issued, but how many witness cannot state; does not know that any prepared for circulation had been lost or mislaid, or deposited with the Bank of Columbus, or with John L. Mustian; does not know whether there was a deed of assignment to R. B. Alexander. Alexander commenced to act as assignee in the Spring of 1843. Defendant then offered to prove by the witness, that Alexander, while he was assignee, declared and alleged, that he acted under the deed of assignment, and not under the Act of the Legislature; that he accepted under the deed, not under the Act of the Legislature. Plaintiff objected; the Court sustained the objection. Defendant thereupon excepted. Witness also proved that the transfer to defendant, of 38 shares of the stock of the bank was on the transfer book before he was elected director and president. Plaintiff then read in evidence the bills mentioned in the declaration. He also read in evidence, an exemplification of the record of a declaration judgment, and execution and return of *nulla bona* by the Sheriff. This exemplification showed the number of bills sued on, their amounts and dates of their signature, but did not specify them by number or letter. The defendant objected to said exemplification being read in evidence, except to prove the

judgment and return of *nulla bona*; and that the recitals in the declaration against Alexander, assignee, was no evidence of the identity of the bills sued on. The Court over-ruled the objection and permitted said exemplification to be read as evidence of the identity of said bills sued on, to which said defendant excepted. The plaintiff here rested his case, and the defendant then introduced SEYMOUR R. BONNER, who testified that he was one of the original stockholders and directors in said Planter's & Mechanic's Bank, in the year 1837; and that John Banks, S. A. Bailey and H. S. Smith were a committee to make arrangement with the bank of Columbus; and he was informed that a specie arrangement had been made with the Bank of Columbus by the committee. The directors went to see if there was a certain amount of specie at their control in the Bank of Columbus. Davis, the cashier, said there was there $226 or $230.000 on deposit, subject to their control, and belonged to the Planter's & Mechanic's Bank; that he, Davis, had arranged with the Insurance Bank for the balance, and that he had a certificate to make up the deficit. I knew nothing of the arrangement but what one of the committee told me. The Planter's & Mechanic's Bank had no banking house at that time, or place for specie. The $226 or $230.000 was all the specie in the bank of Columbus. Specie was then at a premium of from 5 to 8 per cent. No premium was paid for the specie certificates as witness knew of. The stockholders paid into the Bank of Columbus, bank-bills and promissory notes, discounted in that Bank, and Davis gave the directors, for them, the specie certificates. Both of the certificates were deposited in the Bank of Columbus by the directors, after their election, and they had called for the specie. The Planter's & Mechanic's Bank was credited with the amount of them. Witness, on the subject of the disposition of the capital thus paid, corroborated the testimony of Ragan. The directors did not go to the Insurance Bank. The witness further testified, that after the failure of the Planter's & Mechanic's Bank, he bought a

large quantity of the bills of the bank, and had sold some of them; that before the commencement of this suit against Alexander, and before the commencement of this suit, he had placed $1500 of the bills of the bank, in the hands of Wm. Dougherty, as his Attorney, for collection; that he was to pay all costs and expenses, and to collect the one half for the other; and that said Dougherty informed him, a day or two before this trial, that said bills were sued for in the name of this plaintiff, Lane, and embraced in the present suit. The plaintiff, by his Counsel, Wm. Dougherty, did not object to this testimony. Bonner proved that Hines Holt was not a director in 1837, when the letter was written to the Governor enclosing the affidavit of president and directors. The defendant then offered to prove by Hines Holt, that Alexander repeatedly declared and asserted, while acting as assignee, that he acted under the deed of assignment, and not under the law. This testimony was objected to, and the objection sustained; and thereupon, the defendant excepted.

The plaintiff also read in evidence a copy of a letter and affidavit, sent by the directors, upon the organization of the bank, to the Governor of the State, stating that the bank had collected, in specie, $250.000, as required by the charter, and were ready to proceed to organize.

The Court, amongst other things, charged the Jury, that although they might believe, from the testimony, that the original organization of the P. & M. Bank was not in conformity with the charter, but done to evade the law; and although they might believe that said Bonner was a director and stockholder in such bank, aiding such organization; and although they might believe, that at the commencement of this suit, Bonner was the owner of fifteen hundred dollars of the bills sued upon and read in evidence, if they should believe, that in the organization of 1837, Bonner was a director, and that no bills were issued then; and subsequently, in 1838, there was another election of directors; and after this, the bills sued on were put in circulation by the bank, the plaintiff was entitled to recover on Bonner's bills, unless it was shown that Bonner

was a director when the issue was made. To this charge defendant excepted.

The Court was requested to charge, that if there was no evidence before the Jury of the identity of the bills, except the exemplification referred to, that the plaintiff could not recover. The Court refused so to charge, and defendant excepted.

The Jury found a verdict for plaintiff; whereupon, Counsel for defendant moved the Court to require the Attorney of plaintiff to deposit said bills in the office, or to leave copies of the same. The Court refused the same, and defendant excepted.

On these several exceptions, error was assigned.

H. Holt; S. Jones; B. Hill, for plaintiff in error.

W. Dougherty, for defendant in error.

By the Court.—Starnes, J. delivering the opinion.

By written agreement between the Counsel in this cause, it was stipulated, that the argument should be confined to certain specified points; and that a decision on any other of the grounds of error presented by this record, should be waived.

The points presented are the following:

1. The refusal of the Court to compel the plaintiff's Counsel to testify as a witness.

2. So much of the decision as sustained the demurrer to the 4th and 7th pleas.

3. The admission of the record of the suit against the bank in evidence, and over-ruling exceptions to the exemplification thereof.

4. The error alleged in the charges given and refused.

5. In refusing to compel the plaintiff to deposit the bills upon which suit had been brought.

[1.] We think that the Court erred in not permitting Mr.

Dougherty to be sworn, for the purpose of proving the service of a set of interrogatories upon him.

It cannot accurately be said, that the information here sought, was in the nature of "a matter or thing acquired from his client, or during the existence and *by reason of the relationship* of client and Attorney," according to the terms of our Statute of 1850.

The fact sought to be proven was, that a copy of the interrogatories had been left at Col. Dougherty's office, 60 days before the Court. Now, it did not certainly appear, that this fact could have been known to Col. Dougherty only by reason of his relation as Attorney to his client. His clerks or others, in or about the office, might have had as accurate knowledge of the fact as Col. D. If so, it need not have been by reason of his relationship to his client, that the knowledge was obtained by him; and if not, he was not rendered incompetent by the Statute.

[2.] The next point made, is as to the decision of the Court below, upon the demurrer to the 4th plea. In which decision, the Court held that the bills issued by the Planter's & Mechanic's Bank of Columbus, were not illegal and void, notwithstanding that twenty-five per cent. of the capital stock of said bank had never been paid in specie at any time, before or after said bills were issued; and that they constituted a good demand against the stockholders.

We are impressed with the opinion, that this question is a very simple one, and that any other doctrine than that held by the Court below, would be a monstrous outrage on reason and justice; because, unless the complicity of the bill-holder with the banking corporation, illegally emitting bills, was shown, to sustain such a plea would be to allow such a corporation to take advantage of its own most gross and fraudulent wrong. This is reason enough for our opinion.

It may be true, and probably is so, that this bank was not legally organized, because that twenty-five per cent. in specie, was never paid in, as the terms of the charter required. It may be true, that for this reason, a stockholder might have

resisted the payment of an instalment of stock, or a debtor his liability to the bank, (if the rights of third persons were not affected thereby,) and that the State might, at any time, have proceeded to revoke the corporate franchises of this bank. But this is a very different question from the right of a corporation to avail itself of a denial, that it ever possessed corporate franchises, in order to evade payment of just debts, which had been contracted with an innocent creditor, by virtue of its assertion and declaration, that it possessed these very corporate rights. In such a case, where the issue was between a corporation and those who innocently held, for a valuable consideration, its promises to pay, it certainly would be estopped to deny its authority to contract, in any Court of Justice in wide Christendom.

It is not, however, every case in which a debtor to a corporation, thus illegally or irregularly organized, would be allowed to resist the payment of a debt, in good faith contracted with him; nor every case in which the State might rightfully forfeit a charter, where the bank had not proceeded to organize regularly, or had obtained its charter deceptively. In some such cases, it has been held, that the charter "could not, in a collateral action—in an action brought by the company, to compel the performance of contracts entered into with it, be declared void." The reason given is, that "the State may waive the right to exact the forfeiture, or declare the charter void, because obtained by deception." *The President of the Kishacoquillas & Con. Turnpike Co. vs. Mac. Conaby*, (16 *Serj. & R.* 144.)

A decision, similar in principle, has been made by the Supreme Court of New York, in the case of *Spear vs. Crawford.* (14 *Wend.* 24.)

In a somewhat similar case, *Minor et al. vs. The Mechanic's Bank of Alexandria*, (1 *Pet.* 65,) Judge *Story* held, that "it would be difficult to maintain that a collusive subscription got up between the original subscribers and the commissioners, for the purpose of evading such a claim, could be permitted to be set up to the injury of the *subsequent purchasers of*

the stock, who became *bona fide* holders, without participation in or notice of the fraud." In such event, he says, "the law would hold the parties bound to their subscription and compellable to comply with all the terms and responsibilities imposed upon them thereby, in the same manner as if they were *bona fide* subscribers."

If such reasoning and such decisions be correct, and so we believe them to be; if the debtor to a corporation, in an action by the corporation against him, for the debt, cannot be allowed, collaterally, to set up such illegal or deceptive organization; and if such an organization cannot be pleaded to the injury of a stockholder, subsequently and in good faith purchasing; *a fortiori*, it cannot be set up by the corporation itself, when sued by a bill-holder, in good faith.

If the corporation cannot set up such a plea in such a case, then it is liable to pay the bills so held; and if it be liable, the stockholder who is bound for the ultimate redemption of the bills, must, in his turn, be liable: because his liability is an incident to the liabillty of the corporation.

It can be shown, we think, that the decision by the majority of the Court, in the case of *Hayne vs. Beauchamp*, (5 *Smead & M.* 515,) is not in conflict with the views we have just presented. But we will not pause to criticise that case. If it be not in accordance with these our views, it is, in our opinion, wrong.

Many other cases were cited by the Counsel for the plaintiff in error, for the purpose of showing that the stockholder was not liable to pay these bills, because of the fraudulent organization of this bank. Such cases as *Dana vs. B'k U. S.* 5 *Watts & S.* 245. *Crooker vs. Crane*, 21 *Wend.* 212. *Highland Turnpike Co. vs. McKean*, 11 *John.* 98. *Hibernia Turnpike Co. vs. Henderson*, 8 *Serj. & R.* 219. *Craig et al.* 4 *Pet.* 410. *Collins vs. Blanton*, 2 *Wils.* 347.

But these cases fall far short of establishing any such doctrine. They do show, that a Court of Justice will not lend its aid to a man who founds his cause of action upon an immoral or illegal act, if he were a party to that wrongful act. But

none of the cases go the length of holding, directly or in principle, that an innocent holder of a bank bill, issued by a bank asserting the right to the exercise of a corporate franchise, shall not be allowed to collect the same out of that corporation, if, indeed, the bank was fraudulently exercising such franchise.

The rule sustained by those cases is, that an action will not, under such circumstances, be sustained against the bank, if the creditor was *particeps criminis*, or in any way concerned in the fraud. "If, from the plaintiff's own stating or otherwise, the cause of action appear to arise *ex turpi causa*, or the transgression of a positive law of his country, there, the Court says, he has no right to be assisted. It is upon that ground the Court goes, not for the *sake of the defendant*, but because they will not lend their aid "to *such a plaintiff*." Lord *Mansfield*, in *Holman vs. Johnson*, (*Cowp.* 343.)

[3.] It is also our opinion, that the Court was right in sustaining the demurrer to the 7th plea, and in holding that the liability of the stockholder for the redemption of the bills as provided for by the charter, was not secondary and collateral to that of the directors, for excess of debts contracted.

By the 4th regulation of what the Legislature declared should be "fundamental articles of the Constitution of said corporation," it was provided, that "in case of excess, the directors under whose administration it shall happen, shall be liable for the same in their private and individual capacities, and may be sued for the same in any Court of record in the United States, by any creditor."

The directors are thus made liable, equally, jointly and severally, with the corporation, to pay such excess. They may be sued, therefore, in the first instance, and they may be sued at the same time with the bank, or afterwards. But there is nothing in the charter, requiring that they *shall be first* sued, or, indeed, that they *shall be sued* at all. The provision is, that they "*shall be liable*, in their private and individual capacity, and *may be sued* for the same," &c. It is, therefore, left optional with the bill-holder, whether or not he will sue

the director. And the language of the charter makes it necessary that the bill-holder shall sue and exhaust the property of the corporation *only*, before he can sue the stockholder.

[4.] The exemplification of the record in the case of this plaintiff, against Robert B. Alexander, assignee, was properly admitted as evidence of the identity of the bills upon which suit was brought. It does not furnish full and satisfactory proof to this effect, it is true, but it seems indisputable that, when it is taken in connection with all the circumstances before the Jury, and especially with the fact, that the bills came from the custody of the Counsel who was the Attorney of record in the Court below, *some* presumptive evidence was thus afforded that the bills just declared upon, were the same which had been before the Court in the first case—the strength of which evidence was for the Jury to determine.

[5.] The point next made, is upon the charge of the Court, to the effect, that though Mr. Bonner (the real owner of the bills in question) might have been aiding in the organization of said bank in 1837; and although such organization might not have been in conformity to the charter, yet, if no bills were then issued, and if he were not a director at the time the bills were issued on which suit is brought, the plaintiffs are entitled to recover.

What we have have already said, is sufficient to suggest the error of this charge. The course of reasoning which has been pursued, and which has shown, that an innocent bill-holder, not participating in the fraudulent organization of the bank, is entitled to recover against the same, notwithstanding such fraudulent organization, has also clearly shown, that if the bill-holder did take part in such unlawful organization, he cannot enforce an action on his bills; for a Court of Justice will not lend its aid to "such a plaintiff." If, therefore, Seymour R. Bonner participated in the illegal organization of this bank in 1837, and in an unlawful and deceptive return to the Governor, as to the amount of specie which had been paid in, thus aiding and enabling unlawful issues to be made; and if he knew that such issues, subsequently made, were unlaw-

ful, because that twenty-five per cent. of the capital stock had not been paid in specie before said returns were made, he should not be allowed to recover on these bills, and the Court should have given the Jury instruction to this effect.

[6.] The last point which we have been asked to decide in this case, is made upon the ruling of the Court on the motion to require the plaintiff's Attorney to deposit the bills sued on in Court.

Such an order would have been premature, we think, if granted before final judgment or payment of the bills. The reasons assigned for it apply only to such a state of the case; and no reason can be given, we think, why such an order would have been sooner required, whilst there are many reasons why the plaintiff should have the control of his bills, until final judgment on them, or payment of them. We therefore approve the decision of the Court on this point.

Let the judgment be reversed, for the reasons stated.

No. 59.—BENJAMIN O. KEATON, plaintiff in error, *vs.* JESSE M. DAVIS, defendant in error.

[1.] It is not a good objection to the depositions of a witness, testifying to services rendered and articles furnished, which have been entered in a book kept for the purpose, that he does not produce such book, or furnish a list of the items when required so to do, if he state that the book has been lost or destroyed.

[2.] K paid an account for medical services rendered by a physician to the son of D, and brought an action against D for the money: *Held*, that before he was entitled to recover, he should have proved, either that the exigencies of the case made it proper that he should call in the physician and settle with him, or that he had been specially requested so to do by the parent.

Assumpsit, &c. in Dougherty Superior Court. Tried before Judge PERKINS, June Term, 1855.

Jesse M. Davis sued Benjamin O. Keaton for fifty dollars, as money paid out for him, viz: in paying for medical services rendered to the son of Keaton, boarding with Davis.

Upon the trial, plaintiff below offered the depositions of the physician, proving the amount paid and the services rendered. He stated: "I cannot attach the account, as then made, in separate items; I cannot find my account of it as then made; I suppose it has been destroyed, as most of my other papers have been relating to my business done in Georgia." Defendant's Counsel objected to this evidence, because the witness' books were not produced, nor an account of the items attached. The Court admitted the evidence, and defendant excepted.

The plaintiff did not prove any specific request by the defendant, to him, to pay this debt. Defendant's Counsel moved for a non-suit on this ground. The Court refused the motion, and defendant excepted.

On these exceptions error is assigned.

H. MORGAN, for plaintiff in error.

SULLIVAN for VASON & DAVIS, for defendant in error.

By the Court.—STARKES, J. delivering the opinion.

[1.] The first objection made in this case, is sufficiently answered by the statement of the witness, that his book or memorandum of the account had been destroyed, as he supposed; and, therefore, he could not produce it, or append a list of the items.

[2.] The next objection has more force. According to the petition, the amount sued for was paid for medicine, medical services, &c. supplied by Dr. Dunton to the son of the plain-

tiff in error. It appears that this son was boarding with the defendant in error, and was seized with illness while there, which made the attendance of a physician proper; that the defendant in error called in this physician and paid this his bill. No proof was adduced, that this young man was a minor, under the care of the defendant in error; or that his parents were not near him, or that they had not made any provision for him in this respect; or that the exigency of the case was such that it was reasonable and proper that, under the circumstances, this physician should have been called in by the defendant in error to the young man, and the bill paid by him. In such case the law would have implied a promise to pay. But in the absence of any such evidence, and of any proof in the Court below, of any request having been made by Keaton, the plaintiff in error, that the defendant in error should pay this debt for him, or that Keaton had ever promised to pay the same, we think that it was error in the Court to permit a recovery against the plaintiff in error.

For any thing that appears in the case, the plaintiff in error may have had a cross demand against this physician, and he may have looked to this indebtedness as his only prospect of satisfaction, in whole or in part. In such case, even though the charges made by the physician be undoubtedly reasonable, still, injustice may be done to the plaintiff in error, if he be compelled to pay the physician's demand by the unauthorized interference of the defendant in error. Hence, it is just, as well as legal, that the latter should show either that the circumstances of the case made it proper that he should call in this physician, and pay him, as he did, or that he was specially requested so to do by the the plaintiff in error.

Let the judgment be reversed.

No. 60.—THOMAS HATCHER, plaintiff in error, vs. THE STATE OF GEORGIA, defendant.

[1.] Much latitude of discretion must be allowed the Courts, as to their mode of conducting business; to fetter their hands too much, would greatly impede and embarrass the administration of justice.

[2.] Where the defendant is indicted for an assault, with intent to murder, and it was proposed, by his Counsel, to prove a previous fight between the prosecutor and himself, two years previously, and then connect the two, by continued intermediate threats and acts of violence, on the part of the former, it is not error in the Court to require of Counsel to begin at the offence charged in the indictment, and travel back to the first fight, before that shall be given in proof.

[3.] It is the duty of the Judge to have *all* the evidence taken down, which is submitted to the Jury in the trial of felonies; still, it is questionable whether his failure to do so would constitute a good ground for a new trial.

[4.] Where there is a conflict in the testimony, Counsel, in his concluding argument, will not be stopped by the Court, as misrepresenting the testimony, because he assumes that the facts testified to by his witnesses were proven.

[5.] When the Court has charged, fully, all the law of the case, and the Jury, after consulting, return for further instructions upon some particular point, the Court is not bound to repeat all the law favorable to the accused.

[6.] Judgment will not be arrested because three of the nineteen Grand Jurors' names are set out by the initials of the Christian name only.

Assault, with intent to murder. Tried in Dougherty Superior Court, before Judge PERKINS, at June Term, 1855.

A motion was made, in arrest of judgment, upon the verdict in this case, because the names of only sixteen Jurors were written in the bill of indictment—the initials of the names of the other Jurors, only, being inserted. The motion was over-ruled, and defendant excepted.

Defendant's Counsel moved for a new trial, upon the following grounds, among others:

1st. That the Court erred in ruling out the testimony of Charles W. Rawson, of the fight between the prosecutor and defendant, about two years before the alleged crime, when

the prisoner's Counsel announced that they expected to connect the two fights, by repeated threats and continuous acts of violence on the part of Saucer, down to the time of the committing the crime charged in the indictment.

2d. That the Court erred in announcing to the Counsel, that he would not be particular in taking down the testimony, in the precise words and language of the witnesses, in the brief of testimony, and in holding that the brief required to be taken down by the Statute was only a memorandum, or the substance of the statements of the witness, taken at the discretion of the Court, and that Counsel for the prisoner could not be allowed to ask the Clerk, who was taking the brief, to take down any portion they might choose; but that the Court would only have taken down that portion of the testimony which it thought proper and material; and also, in refusing to let the brief be read over to the witnesses, after it was taken down, unless desired by the witness.

3d. That the Court erred in refusing to stop the State's Counsel in the concluding argument to the Jury, when misstating and misrepresenting the testimony, although requested so to do by the prisoner's Counsel; which misstatements consisted in the Counsel's saying to the Jury, that the evidence was, that Saucer, when he left the crowd and went in pursuit of Hatcher, did not have his hand in his pocket, but held both of them down by his side; when the testimony of J. T. Greer was, that one of his hands was in his pocket, and, he thinks, his left hand; also, that there was no evidence that Hatcher saw Saucer when he came up to the crowd; also, that the testimony of Walker was, that when Hatcher appealed to the by-standers on the side-walk, Saucer stopped pursuing him; when the testimony of Walker was, that Saucer did not stop until Hatcher turned round to shoot; and other misstatements, of the same kind: *The Court holding,* that he would not allow interruptions, when there was a conflict in the testimony.

4th. That after the Jury had retired to their room and remained some two or three hours in consultation, they were,

by their own request and the consent of Counsel, brought back and re-charged by the Court; in which re-charge, the Court told the Jury, that if they believed, from the evidence, that Saucer intended, when he went in pursuit of Hatcher, to commit a felony, Hatcher was justifiable; and when Counsel for prisoner rose to request the Court to correct his charge, he peremptorily ordered them to sit down, and refused to hear them; and the Jury retired, and in a few minutes, returned with a verdict of guilty.

5th. That two of the Jury, to-wit: Archibald P. Greer and B. A. D. Hampton, had formed and expressed a decided opinion, unfavorable to the prisoner, before they were taken on the Jury; and which opinions and expression were unknown to prisoner and his Counsel, at the time they were taken, but they were regarded as fair and impartial Jurors.

The last ground was supported by the affidavits of the Jurors themselves, showing, that from having seen the crime committed, and from having heard the evidence under oath, they had formed and expressed opinions as to the guilt of the prisoner.

The Court over-ruled the motion for a new trial, and defendant excepted.

On these exceptions, error has been assigned.

H. MORGAN, for plaintiff in error.

Sol. Gen'l LYON; STROZIER & SLAUGHTER, for the State.

By the Court.—LUMPKIN, J. delivering the opinion.

Was it error in the Court to rule out the testimony of Charles W. Rawson?

The defendant proposed to prove, by this witness, a fight between the prosecutor and himself, two years before the alleged crime was committed, the prisoner's Counsel announcing that he expected to connect the two transactions, by repeated

and continued threats and acts of violence, on the part of Saucer, down to the time of committing the offence charged in the indictment.

[1.] Much latitude of discretion must be allowed to the Courts, as to the mode of conducting business; and to fetter their hands too much, will greatly impede and embarrass the administration of justice.

[2.] And we see no objection to the course pursued in this instance. Why could not Counsel begin at the last fight and go back to the first, as well as to reverse this order? By pursuing this course, there would be no danger of admitting illegal testimony: whereas, by getting in proof of the first fight, and then failing to connect the two, injury would have been done. True, the testimony could have been withdrawn, as to the first fight, if the defendant failed to connect the two. Nevertheless, impressions would have been made, which could not be eradicated.

The evidence, as to the intermediate threats and acts of violence, all came out; and it utterly fails to link the two fights together. On the contrary, it establishes the fact, that Saucer had stood in the relation of employer and friend to Hatcher, and done him kindnesses.

Perhaps the Court was not sufficiently guarded in the remarks made concerning the taking down of the testimony, if, indeed, they were made. They are not in the bill of exceptions, proper, but appear, by way of recital, in one of the grounds taken for a new trial. Whether, the motion being over-ruled, the Judge is to be understood as indorsing the truthfulness of all the facts assumed in the motion for a new trial, is somewhat questionable.

[3.] In the opinion of this Court, it is the duty of the presiding Judge, and one clearly prescribed by law, to have *all* the testimony which is submitted to the Jury taken down as accurately as possible, and read over to the witness, to be corrected and approved, to be used for any purpose which it may subserve. And we further hold, that it is the duty of the Court, when Counsel rise repeatedly and request that this

and that piece of evidence may be noted, by way of giving emphasis to it before the Jury, to set Counsel down; and thus, prevent the progress of the trial from being disturbed by such unreasonable interruptions.

Has any injury resulted to the party in this case? It is conceded, that all the material proof was taken down, and is now in the brief of testimony; and whether taken down or not, all of the evidence went to the Jury. We are not prepared to admit, that the omission to take down the proof, would be a good ground for a new trial. More could not be asked by the prisoner, than a fair and impartial trial upon *all* the facts. That he has had.

[4.] The next error complained of is, that the State's Counsel was not stopped, in his concluding argument, from misrepresenting the testimony—the Court deciding, that it would not listen to any application of this sort, where the evidence was conflicting. Defendant's Counsel acknowledges, in his argument before this Court, that there was a conflict in the proof upon the point about which the alleged misstatement took place; and the record confirms the fact. Was not the Court, then, clearly right in not interposing? It might be more proper, perhaps, where there is a conflict, for Counsel to speak a little more accurately as to what is or is not proven. But we must not prescribe an iron rule upon this subject. It would trammel, too much, that freedom of discussion so necessary to the eliciting of truth.

[5.] After the Jury had retired to consult, they returned to get further instructions from the Court. It is distinctly admitted, that in his general charge, at the close of the case, the Judge submitted the whole law of the case, fully, to the Jury. And it is not denied, but that what he subsequently repeated to them was correct. The complaint is, that he did not go far enough the second time; and that when Counsel rose to "*correct*" his charge, in this respect, he was set down.

We do not agree with defendant's Counsel, in denominating his effort as an attempt to "*correct*" the Court. It was neither more nor less than an attempt to get the Court to *re-iter-*

state to the Jury *all* the charge which was favorable to his client. This the Court was not bound to do.

The ground, as to the disqualification of two of the Jurors, Greer and Hampton, is abandoned; and need not, therefore, be considered.

[6.] Was the Court wrong in over-ruling the motion to arrest the judgment, because the full names of sixteen Grand Jurymen, only, were in the body of the indictment, three more having been written with the initials only?

In the first place, we say that this clerical error might have been corrected by the minutes of the Court or otherwise. Secondly, that men in this country are frequently just as well known by their initials, as any other way. The practice is somewhat different in England. A man is usually called, there, by his whole name—as, James Sheridan Knowles. And this has always been so. And hence, the Common Law rule, as to names, has always been more stringent than in this country. But, thirdly, this being a motion in arrest of judgment, and not affecting the real merits of the offence charged in the indictment, comes too late. "All exceptions which go merely to the *form* of an indictment, shall be made before trial; and no motion, in arrest of judgment, shall be sustained for any matter not affecting the real merits of the offence charged in such indictment." (*Cobb's Digest*, 883.) What a world of meaning in this little section! And yet, it has lain almost dormant in the Penal Code, for nearly twenty years! It is second only, in importance, to the 1st section of the same division, which declares, that every indictment shall be deemed sufficiently technical and correct, which states the offence so plainly that its nature may be easily understood by the Jury, and which was fully applied, for the first time, in *Studstill's case*, in 7 *Ga. R.* What a cloud of technical cobwebs and quibbling distinctions have been swept away by these two broad enactments!

The other two grounds, that the verdict was contrary to

law and evidence, are not insisted upon; and consequently, are not considered.

No. 61.—BEHN & FOSTER, and another, plaintiffs in error, vs. JOHN N. PHILLIPS, defendant in error.

[1.] A mortgage executed by a defendant against whom a verdict has been rendered, upon which an appeal has been taken, is an *alienation*, within the sense of the Act of December 19th, 1822, passed for the purpose of preventing "an alienation by the party of his, her or their property, between the signing of the first judgment and the judgment on the appeal."

Rule, in Dougherty Superior Court. Decision by Judge PERKINS, at May Term, 1855.

Behn & Foster recovered judgments against A. Y. Hampton, from which he appealed, with James J. Green as his surety on the appeal. Before judgment on the appeal, Hampton executed mortgages to other creditors, upon portions of his property. Upon a rule to distribute money arising from the sale of the mortgaged property, the facts being agreed on, Counsel for Behn & Foster moved the Court for a rule adjudging the money to them, on the ground that the mortgages were *alienations* by the defendant, in contravention of the Act of 19th December, 1822. The Court refused the the rule, and this decision is assigned as error.

The writ of error was sued out in the name of Behn & Foster and James J. Green, the surety on the appeal. A motion was made to dismiss the writ of error, on the ground that James J. Green was no party to the proceedings in the Court below, and was improperly joined as a party; and that Behn & Foster were not made parties to the writ by their consent,

are they represented here by Counsel; nor do they com-
in of the decision set forth in the bill of exceptions.

HINES; CONLEY, for plaintiff in error.

R. F. LYON, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

1s] The judgment in this case must be controlled by the
struction which is given to the Act of December 19th,
52, declaring, that "where an appeal is entered from the
t verdict, the property of the party against whom the ver-
t is rendered, shall not be bound, except from the signing
the judgment on the appeal, except so far as to prevent the
alienation by the party of his, her or their property, be-
en the signing of the first judgment and the signing of
judgment on the appeal."

Pending this appeal, the judgment debtor, A. Y. Hamp-
, executed certain mortgages of his property to other per-
s than the plaintiffs in error, (who were the plaintiffs in
case which was upon appeal,) and the question is now
de, whether or not such a mortgage was an *alienation* of his
perty by the debtor, within the meaning and purpose of
aforesaid Act.

We may be aided, in the effort to discover the sense in
ich the word *alienation* was employed in the Act, by first
ertaining what was the mischief which the Act was inten-
l to remedy. It will be admitted, without cavil, that that
chief was *the parting with that power over, or interest in
property by the defendant, which would operate to the
judice or deprivation of the substantial interest of the
gment creditor.* The Act was intended to secure and
serve, to the plaintiff, the interest in, or lien upon, the de-
dant's property, which had been created by his verdict
l judgment. And it was undoubtedly intended, that by it
should be restrained from doing any thing, the effect of

which would be to vest in another, any such interest in or right over his property, as would effectually defeat the plaintiff's right to have the same made subject to any judgment he might finally obtain on the appeal. Any thing, therefore, done by the defendant, which would operate to the deprivation of the judgment creditor's interest, would be, in our opinion, an *alienation* within the sense of the Act.

It is true that the Common Law definition of alienation was different. That was *a parting with property, the direct object of which was to deprive the heirs of the substantial interest in the estate.* And it has been correctly argued by our brother Lyon, that a conveyance by mortgage, being in Georgia a mere security for the debt—a mere lien, is not an alienation in this sense. But if we are right in what we have already shown, the Legislature did not contemplate an alienation in this sense—was not looking to a parting with the property with reference to the interest of the heirs, but to that of the judgment creditor.

Inasmuch, then, as a mortgage, unless it be held to be an alienation within the terms of the Act, as thus construed, could be easily and readily resorted to by the defendant, instead of a direct conveyance, and thus the mischief which the Act was intended to correct be left entirely unremedied, we think it becomes very plain that a mortgage is such an alienation, in our State, as was contemplated by the Legislature which passed this Statute.

An effort has been made to analogize this lien by mortgage, in Georgia, to other mere liens which are not conveyances. A debt contracted by the defendant, during the pendency of the appeal, has been taken as an example.

If such a lien were coupled with a power which authorized the creditor, without any further act of the debtor, to enforce the same against the property of the debtor, and gave the judgment relation back to the time of the contract, then the analogy would serve. But such are not characteristics of a mere debt; and therefore, the reasoning is not accurate.

Let the judgment be reversed.

No. 62.—GEORGE CURRELL, survivor, &c. plaintiff in error, *vs.* JOHN N. PHILLIPS, defendant in error.

1.] A motion to rule a Sheriff, on the ground that he has failed to levy on the property of the defendant in *fi. fa.* will not be sustained, unless the movant make it appear that he has been *injured* by the Sheriff's failure to levy.

Rule, in Dougherty Superior Court. Decision by Judge PERKINS, at June Term, 1855.

A *fi. fa. vs.* Andrew Y. Hampton, issued from May Term, 1854, and returnable to November Term, 1854, of Dougherty Superior Court, was placed in the hands of John N. Phillips, the Sheriff, on 23d June, 1854. At June Term, 1855, a rule *nisi* was granted, requiring the Sheriff to show cause why he should not pay over the amount due on said *fi. fa.*

The Sheriff returned, that *since the last term* of the Court, he had seized and sold all of the property of defendant, the proceeds of which were subject to the order of the Court; that the sale of seven negroes had been stopped by an injunction, granted by this Court since the last term. The amount in his hands was $27.408 77, claimed by sundry *fi. fas.* most of them older than that of the movant's.

The Court refused to make the rule *vs.* the Sheriff absolute; and this decision is assigned as error.

SPICER, for plaintiff in error.

R. F. LYON, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] Should the Court below have made the rule *nisi* an absolute one against the Sheriff?

Section 50 of the Judiciary Act of 1799, is in these words: The Sheriff shall be liable, either to an action on the case

or an attachment for contempt of Court, at the option of the party, wherever it shall appear that he hath injured such party, either by false returns or by neglecting to arrest the defendant, or to levy on his property, or to pay over to the plaintiff or his Attorney, the amount of any sales which shall be made under and by virtue of any execution, or any moneys collected by virtue thereof."

The Sheriff shall be liable to a rule, wherever it shall appear that he hath *injured* a party, &c. by failing to *levy on the defendant's property*, &c.

In this case, the Sheriff failed to levy on the property of the defendant in *fi. fa.* until after the return term of the *fi. fa.* Before the next term after that term, he did, however, seize and sell *all* of the property of the defendant, except some negroes, which he was prevented from selling by an injunction. And the proceeds of the property sold he had in hand when this rule was taken, holding under the claim of other *fi. fas.*

This being the state of the facts, the question is, does it "*appear*" that the Sheriff, by failing to levy until after the return term of the writ, "*injured*" the plaintiff? And we must say, that it does not. It does not appear that any of the defendant's property was lost to the plaintiff, by the delay. It does appear, that there were older *fi. fas.* against the defendant in *fi. fa.* and it does not appear but that these *fi. fas.* may have been large enough to require, for their satisfaction, the whole of the property of the defendant in *fi. fa.*

We, therefore, cannot disturb the decision of the Court below, refusing to make the rule absolute.

No. 63.—MARTHA HOOKS, plaintiff in error, vs. MANNING G. STAMPER, defendant in error.

[1.] Where the appellant and his security signed their names upon the minutes of the Court, for the Clerk to write the bond above, and he failed to so: *Held*, that it is, nevertheless, a good appeal, and the omission may be supplied at any time.

[2.] A will of personalty without witnesses, being void under the Act of 1852, the judgment of the Ordinary, admitting such a paper to probate, is a nullity, and may be set aside, upon motion, at any time.

Probate of will. On appeal, in Lee Superior Court. Decision by Judge PERKINS, June Term, 1855.

Martha Hooks, widow and relict of Robert S. Hooks, moved a rule in the Court of Ordinary of Lee County, that Manning G. Stamper, executor of the will of said Robert S. show cause, at the next term, why the judgment admitting the will to probate, should not be set aside and revoked, on the grounds:

1st. That the paper, itself, shows that it was not attested as required by law.

2d. That the affidavits of the witnesses on which the probate passed, do not show that they attested and subscribed the paper in the presence of testator.

At the next term, the rule was made absolute, and the letters testamentary revoked. Stamper, being dissatisfied, applied to the Ordinary to appeal, and he and his surety signed a blank bond. Their signatures were attested by the Ordinary, but the bond was never filled up. Counsel for Mrs. Hooks moved to dismiss the appeal, on the ground that there was no appeal. Counsel for Stamper proposed to prove the facts by the Ordinary and the surety. The Court admitted the evidence and refused to dismiss the appeal. To both of which decisions, Counsel for Mrs. Hooks excepted.

Counsel for Stamper then moved to dismiss the whole proceedings, on the ground that the first probate was in solemn

form. Which motion the Court sustained, and Counsel for Mrs. Hooks excepted.

Counsel for Mrs. Hooks proposed to amend the rule, and insert, as ground for setting aside the probate—

1st. That the paper propounded is void, as a will, under the Act of 1852, because there was no witness who could have been called to prove it in solemn form.

2d. Because Mrs. Hooks never had notice of the motion for probate, in solemn form.

The Court refused to allow the amendment, and Counsel for Mrs. Hooks excepted.

On these exceptions, error has been assigned.

STROZIER & SLAUGHTER; WARREN, for plaintiff.

LYON; HOOD, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Was the Court right in refusing the motion to dismiss the appeal, and in allowing the clerical omission to fill up the bond, to be supplied by parol? We think so, most clearly.

The party had done, as the testimony shows, all the law required of him to entitle him to an appeal. He had paid the cost and entered his own name, together with that of his security, upon the minutes, to be filled up with the necessary bond. He could do no more. And the omission of the Clerk to write out the bond, must not be allowed to deprive him of his Statutory right. Indeed, this clerical mistake is amendable, both by the Statutes of *Jeofails* and the Act of 1818. (*Prince*, 442.)

[2.] Was the Court right in sustaining the motion to dismiss the case?

The will of Robert Hooks had been proven and admitted to record; and yet, it had no attesting witness, as appears from the probate itself. The witnesses who prove the execution of the will, do not pretend that it was attested. Indeed, it is

conceded that it had no subscribing witnesses. The will was therefore utterly void, and of no effect, according to the Act of 1852, extending the provisions of the Statute of Frauds, as to realty, to all wills of personalty, executed after the 1st day of June, 1852. (*Pamphlet Laws*, 154.)

This will was made several months thereafter. It was competent, therefore, to move, at any time, to set aside the judgment of the Ordinary admitting this paper to probate. It was a nullity upon its face; and in favor of such a judgment nothing could be presumed. The appeal must be re-instated.

We apprehend that the appellees will find themselves under no necessity to amend their pleadings; they have the right to do so. This point was so decided in *Vance against Crawford*, in the case of *Marshall Keith's Will.* (4 *Ga. R.* 445.) It was there held, that the pleadings might be amended in the Superior Court, on an appeal from the Court of Ordinary. According to the forms of proceeding in the Ecclesiastical Courts, there were no pleadings as in the Common Law Courts. And we have fallen into error in supposing, that in conducting business before our Courts of Ordinary, or in the Superior Courts, when sitting on appeals from the Ordinary, that that strictness was necessary which was observed in the Common Law Courts.

No. 64.—THE JUSTICES OF THE INFERIOR COURT OF DOUGHERTY COUNTY, plaintiff in errror, *vs.* GEORGE W. CROFT, defendant in error.

[1.] When there is a mere breach of a personal contract, for which the defendant is liable in damages, and it is not shown that irreparable injury will result, unless the contract be specifically performed, a Court of Equity will not decree such specific performance.

[2.] The Justices of the Inferior Court in our State, are not liable to be sued

s a *quasi* corporation, unless special statutory provisions, to this effect, be made; and the only remedy by which a contract can be enforced against them is mandamus.

In Equity, in Dougherty Superior Court. Decision by Judge PERKINS, at Chambers, 19th January, 1855.

George W. Croft filed a bill, alleging that he had contracted with the Justices of the Inferior Court of Dougherty County, to lay the bricks in a new Court House, by a written agreement; that he went to considerable expense to prepare to do the work, and was proceeding to do it, when the Justices withdrew all of the hands which they contracted to furnish, and all materials, after complainant had laid 150,000 bricks; that he continued in possession of the work, but had been deprived of it by a possessory warrant; that the Justices falsely alleged that he was not executing the work according to the contract, and permitted one Batterson to take possession of the work, who was utterly unable to respond for damages to complainant; that, under the decision of the Supreme Court, he was not able to sue the Justices, and his only remedy was in Equity. The prayer was for an injunction. The Court granted the injunction, and this decision is assigned as error.

Issue was joined, with a protest, that a writ of error would not lie to a decision granting an injunction.

STROZIER & SLAUGHTER, for plaintiffs in error.

WARREN & WARREN, for defendants in error.

STARNES, J. delivering the opinion.

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It is, at most, a mere breach of a personal contract or covenant, and it is not shown that irreparable injury will result, unless the contract be specifically enforced.

It is true, that it is alleged, that Batterson is not able to respond for the damage which he may do, if he be allowed to proceed in the erection of the building. If this allegation have force, it is as a reason why *he* should be enjoined from proceeding to carry on the work in question—not as a reason why the contract should be specifically performed. It was made with the Justices of the Inferior Court; and if to be specifically performed, is to be performed by them, not by Batterson. If it cannot be enforced specifically against them, it is not, of course, pretended that it can be against him; and therefore, so far as the specific performance of the contract is concerned, it does not matter whether he is able to respond in damages or not.

[2.] But, according to the allegations of the bill, the Justices of the Inferior Court, as such, are the only persons who contracted with the complainant for the erection of this building; and if they are not, no one else is liable.

As stated in the bill, this Court has decided, in the case to which reference is there made, viz: the case of *The Justices of the Inferior Court vs. Haygood*, (15 *Geo.* 309,) that the Justices of the Inferior Court in our State, are not liable to be sued as a *quasi* corporation, unless provision be made by Statute, authorizing the same; and that the only remedy by which a contract can be enforced against them, is *mandamus*. Our reasons for this opinion are given fully in that case.

This proceeding cannot be sustained against this Inferior Court, of course, unless they can be so sued. If they cannot be so sued, the injunction, as against them, cannot be sustained. Neither can it be sustained as against Batterson and Kendall; for if the Court cannot be restrained from proceeding with the building, it follows, as a necessary consequence, that their agents cannot be; and these persons are but their agents.

Judgment reversed.

No. 65.—Joseph E. Knowles and others, plaintiffs in error, *vs.* Wilborn J. Lawton and others, defendants in error.

[1.] Merger does not, in general, take place when the person in whom the two estates meet, *intends* that it shall not take place.

[2.] [3.] If the holder of the equity of redemption takes an *assignment* of the mortgage, which is in the process of foreclosure, and *goes on with the suit of foreclosure*, his *intention*, it is to be presumed, is, that the equity of redemption shall not merge in the legal estate; and therefore, the equity of redemption does not merge in the legal estate.

[4.] A judgment foreclosing a mortgage, binds not only the mortgagor, but also his vendee—and this it does, although the vendee may not be a party to it.

[5.] The purchasers of parts of mortgaged property, have not the right to compel the mortgagee to resort, for his money, *first*, to the part of the property remaining in the hands of the mortgagor.

In Equity, in Baker Superior Court. Decision by Judge Perkins, June Term, 1855.

The bill alleges, that on the 6th day of December, 1848, John L. Casey purchased of James Thomas, lots of land 281, 2d district Baker County; 5, 124, 324, 325, 326, 327, in the 7th district of said county; 325, 366, in the 8th district of said county; 45 in the 9th district; 73 in the 13th district of Early; 39, 287, 336, in the 26th district of Early; 95, 98, 148, 149, 182, in the 28th district of Early; and 146 in the 15th district of Lowndes, at the sum of $3.335\frac{75}{100}$, for which sum Casey executed his note to Thomas, payable three years after date. Thomas conveyed the lands to Casey, and took a mortgage upon them to secure the payment of the note. This mortgage was recorded in Baker County, on the 13th day of December, 1848, seven days after it bears date; that on the 12th day of November, 1849, Nichols Boon purchased of Casey, without notice of the mortgage, lot of land No. 124, in the 7th district of Baker County, for the sum of forty dollars; and that Casey, by deed of that date, conveyed the land to Boon; that plaintiffs in error, without notice of the

mortgage in any way whatever, on the 31st of December, 1850, purchased No. 124, in the 7th district of Baker, together with another lot of land, for $550 (No. 124 being estimated, in the sale, at $150) from Boon, and took his conveyance therefor; that on the 1st day of April, 1852, defendant, Lawton, being in possession of lot No. 281, in the 2d district of Baker, under a claim from some person pretending to hold title from Casey, which was acquired subsequently to complainant's title; and being desirous to secure his title on the first day of April, 1852, purchased of John L. Casey all the land embraced in the mortgage, with a full knowledge of the existence of the mortgage, and took his conveyance therefor, at the sum, as expressed in the deed, of $3.335—but, in fact, for a much less sum; and if the deed was founded upon any consideration at all, it was upon the agreement that Lawton should stand in Casy's stead and take up the mortgage; that although the deed was taken by Lawton, it was for the joint benefit of him and defendant, Cheever; that Lawton, to complete his title to lot No. 281, in 2d district of Baker County, together with Cheever, previous to the conveyance by Casey to Lawton, and before the April Term, 1852, of Baker Superior Court, purchased the note of Casey to Thomas, and took an assignment of the mortgage, and thereby the lesser estate merged in the greater, except as to complainant's lot of land and Nos. 5 and 7, in the 7th district of Baker County, conveyed by Casey on 12th November, 1849, to Francis Boatright; Nos. 325, 326 and 327, in the county and district last aforesaid conveyed, on 7th day of September, 1851, by Casey to John T. Moat; that the lot of land held by Lawton was worth, at his purchase, $2.500, and that he realized from its sale to William E. Collier, $3.125, or other large sum; the balance of the lands, excluding those sold by Casey previous to conveyance to Lawton, being worth much more than the balance due on the mortgage debt, after deducting the value of the lot owned and held by Lawton; that by means of the premises, the mortgage debt became and was extinguished; and that after it was so extinguished, and after Casey had

parted with all his interest in the lands, Lawton and Cheever proceeded, at April Term, 1852, of Baker Superior Court, to foreclose the mortgage in the name of James Thomas; that at this term of the Court a *rule nisi* was granted, and being served by publication, was, at the October Term, 1852, made absolute; that execution issued upon the judgment of foreclosure, and was levied upon the mortgaged lands lying in Baker County, including No. 124, in the 7th district of Baker, the lot claimed by complainants.

That Joseph E. Knowles, one of complainants, interposed his claim to the lot, which claim is still pending on the appeal; that Boatright, previous to the sale in March, 1853, interposed his claim to the lands, conveyed by Casey to him, which is pending on the appeal; that his conveyance is of the same date as Casey's conveyance to Boon; that Washington D. Bailey interposed his claim to lot of land number 324, in the 7th District of Baker, under a title adverse to Thomas and Casey; that Thomas' title is the true title and the lot worth $1.500; that Bush interposed his claim to the lands conveyed by Casey to Moat, and which had been conveyed by Moat to Bush, which claim is also pending on the appeal, the lands worth $2.500; that Clifton interposed a claim to lot of land number 366, in the 8th district of Baker County, worth $2.000, and held under an incomplete contract entered into with Casey subsequent to the sale to Boon, the contract not having been reduced to writing; that Clifton had partly executed the contract, by taking possession of the land and paying the whole or a part of the purchase money he had agreed to pay; that, previous to the sale in March, 1853, defendant, Cheever, was "let into the trade" upon terms unknown to complainant, but he, thereby, became jointly interested with Lawton in all the mortgaged lands, except 281, in 2d Baker, giving Lawton, to that extent, the advantage, by his voluntary relinquishment of his claim upon that lot of land, and to the extent of the value of that lot, committed a fraud upon complainants; that at the sale in March, 1853, Lawton and Cheever jointly purchased lot No. 45 in the 9th, and 325

in the 8th district of Baker County; that Lawton became the purchaser of 281 in 2nd district of Baker County; that the two lots bought by Lawton and Cheever were bid off at the nominal sum of $542; that competition was discouraged, from the fact that Lawton and Cheever, as the owners of the mortgage *fi. fa.* had a decided advantage over other bidders; and that if such bidders desired to purchase the lands in future, they supposed that the fact of their running them upon Lawton and Cheever, would lessen their chances to procure them on as favorable terms.

That in consequence of a contract between Lawton and Collier, and to enable Lawton to execute his contract, it became indispensable that Lawton should purchase lot of land No. 281, in the 2d district of Baker, and that when it was exposed to sale, William Clifton commenced bidding for it so as to make it bring its value and satisfy the mortgage, that he might relieve from the incumbrance the property he held subject to it—and that Lawton entered into a fraudulent contract with him, to prevent him from running the land, agreeing to procure and protect Clifton's title against the mortgage to the lot of land he held, or give him such compensation therefor, as would be satisfactory to him; that in pursuance of this understanding, Clifton ceased to bid, and the lot of land was knocked off to Lawton, at the sum of $300; that Cheever was present, knew the value of the land and assented to the sacrifice, and that this was a fraud upon the rights of complainant; for that but for the arrangement, Clifton would have bid $2000 for the land, and Lawton would not have permitted it to have gone into the hands of any other person, at that price; and that but for the arrangement with Clifton, he would have competed for the purchase of lot 325, in the 8th district, and would have made it bring $1000; that the mortgage *fi. fa.* was credited with the amount the land brought at the sale, when it should have been credited with the full value of the land; that after the sale, and in pursuance of the contract with Clifton, Lawton and Cheever, on the 1st day of November, 1853, conveyed to him lot No. 325, in the

8th district of Baker County, worth $2000 or other large sum; gave him, also, $250 for his interest in the lot claimed by him; and that Clifton also relinquished his right, to Lawton and Cheever, to lot of land No. 366, in the 8th district of Baker County, and conveyed to them No. 398, in the 2d district of Dougherty County, a third and poor lot of land of the value of $250 or other small sum; that while these negotiations were going on, Clifton's claim to lot 366 was pending; and after they were consummated, it was withdrawn, and that the levy proceeded and the land was sold by the Sheriff, in July, 1854, and bid off, by Lawton and Cheever, at $700, it being greatly under its value, and that it sold for that sum in consequence of the previous arrangement with Clifton.

That Lawton and Cheever caused the mortgage to be foreclosed upon the lands in Early and Lowndes, and the lands to be sold under the foreclosure; that complainants do not know the prices or the purchasers of the lands, but were informed that they were bid off by Lawton and Cheever for much less than their real value; that by mistake, the claim was interposed in the name of Joseph E. Knowles, when it should have been made in the joint names of George and Joseph E. Knowles; that Thomas had parted with all his interest in the mortgage, before any proceeding was had to foreclose it, and that the proceedings were instituted by Lawton and Cheever, for the fraudulent purpose of preventing complainants, Boatright and Bush, from going in Equity and compelling them to resort, first, to the lands remaining in the hands of Casey, or in their hands, as the last purchasers from him, for the satisfaction of the mortgage; and in the event of the insufficiency of the lands to satisfy the mortgage, then to go upon the lands purchased by Boatright and Moat, in the inverse order of their purchase, and only for any balance that might thereafter remain upon the lot of land upon complainants.

The bill prays a discovery, that the foreclosure of the mortgage may be set aside and the sales thereon may be declared

void; that Lawton and Cheever may account, and that the real value of the lands may be applied to the satisfaction of the mortgage; and that if the lands really owned by Casey, at the sale to Lawton, should be insufficient to satisfy the mortgage, then, that those sold by Casey may be sold for that purpose, in the inverse order of their dates, beginning with the last first. And an injunction against the sales under the mortgage *fi. fa.* was also prayed and granted.

To this bill, Lawton and Cheever filed their joint answer, in which they admit the sale from Thomas to Casey and the mortgage and debt from the latter to the former; admit, also, the transactions between Casey and Boon, between Boon and complainants, between Casey and Moat, and Moat and Bush; deny that Lawton and Cheever made any purchase from Casey; or that the purchase made by Lawton from Casey, was for the joint benefit of Lawton and Cheever; but, on the contrary, was for the sole benefit of Lawton, to protect the title to lot of land number 281, in the 2d district of Baker, which he had previously purchased from Alexander B. Lawton, who had a bond for titles from one McGuire, who purchased one half of said lot from Casey on the 15th November, 1849, and took his deed to the same; that when defendant, Lawton, called upon A. B. Lawton for his title to the lot of land, he produced the bond of McGuire, and turned it over to him; upon applying to McGuire, to make titles and take up the land, McGuire informed him that the land was subject to the mortgage, and that he had a deed only to one half of the lot; he also informed him that Thomas had promised him to release the land from the mortgage, upon the payment of $1.000. In the contract between defendant, Lawton, and A. B. Lawton, that lot having been rated at $1.150, it was understood between them and McGuire, that the bond should be delivered to McGuire, upon his turning over his deed from Casey to defendant, Lawton, which he did; that defendant, Lawton, should retain $1.000 of the purchase price of the land, and pay to A. B. Lawton $150, which was done; and

that defendant, Lawton, should, with the $1.000, release the land from the mortgage. Defendant, Lawton, denies that, at the time he procured the deed from Casey, he had any knowledge of the sale and conveyance to complainants; on the contrary, Casey told him he had only sold, of all the lands conveyed by Thomas to him, one half of lot No. 281, in the 2d district of Baker County, to McGuire. They say that Thomas refused to release the mortgage lien upon lot 281 for $1.000; and that, after this refusal and the conveyance by Casey to Lawton, defendants, Lawton and Cheever entered into a negotiation with Thomas for the purchase of the mortgage and debt it was given to secure; and shortly after, 15th November, 1852, the Attorney in fact of Thomas, closed the negotiation and assigned the mortgage and debt to defendants, Cheever and Lawton, they paying therefor, the sum of $3.335 principal, with lawful interest thereon, and $179 fees due the Attorney, for services rendered in foreclosing the same. They admit they had notice of the conveyance of several lots embraced in the mortgage, before it was assigned to them; state that the equity of redemption was assigned to Lawton only, and that the mortgage was assigned to him and Cheever, jointly; deny that it ever was their intention to merge the mortgage in the fee, or that the equity of redemption and mortgage united in the same person.

They also deny that the lot purchased by Lawton, at the time of purchase, was worth $2500, but was only worth, then, what Lawton agreed to give for it, $1150 dollars, having then no improvements on it, except a well previously dug, and admits the sale of the lot by Lawton, as charged and for the price charged, its value having been enhanced from the improvements he put on it and from its connection with other lands included in the same sale; deny having instructed proceedings for the foreclosure of the mortgage, not having then procured the assignment, but became the owners of the mortgage at the period above stated; admit that Casey had no interest in the land when the proceeding was instituted; deny the fraud with Clifton as charged, and state the charge

to be utterly *false;* that Clifton bid for the lands, and was neither induced or persuaded by defendants not to bid; that they know nothing of the motives persons had not to bid for the lands, as the by-standers at the sale never informed them of their reasons; state that they were surprised at the small price which No. 281 brought at the sale, but attribute it to the fact, that the neighbors and others knew the trouble and expense Lawton had been at in procuring a title to it, and the sympathy they felt for him on that account; complainants, Knowles, Boatright, Bush and Bailey, their Attorneys, all attended the sale and had an opportunity to bid; deny all the allegations as to contract and combinations with Clifton, to prevent him from bidding; after the purchase of the mortgage by Lawton & Cheever, jointly, it was agreed between them that Lawton should take No. 281 at $1000, and account to the firm for that amount, notwithstanding the price it might bring at the sale; deny that the exchange of lands between defendants and Clifton was in pursuance of the fraudulent contract previously charged, or that it was unfair or unequal, but that the lands they procured from him were worth what they gave him for them; had Clifton's claim to 366 dismissed as soon as they could do so after the exchange with Clifton, and admit the purchase of it at Sheriff's sale at the price charged; deny any arrangement at this or any other sale, to prevent competition; the lands in Early County brought $451,$\frac{45}{100}$, and were not purchased by them; that the lot in Lowndes was purchased by them at $200; they state that the consideration of the deed, from Casey to defendant, Lawton, was his release from the covenant of warranty to McGuire for one-half of lot 281; and deny that it was understood between Casey and Lawton that Lawton should take his place and pay the mortgage; and deny the motive imputed to them for foreclosing the mortgage, or that they ever used it to prevent competition, and only become bidders for and purchasers of the land to save themselves, after having offered complainants and others an opportunity to unite with them, and contribute, rateably, to the value of the land they held, to the discharge

of the incumbrance, which they refused; they admit that the lot claimed by Bailey has been recovered from, and is subject to the mortgage, and express their willingness to sell the same before going on the other lands.

Upon the coming in of this answer, defendants moved to dissolve the injunction, upon the ground that it denied the equity of complainant's bill; and the Court passed an order dissolving the injunction, which is assigned as error here.

R. F. LYON and SLAUGHTER, for plaintiffs in error.

H. M. BUFORD; MILLER AND HALL, for defendants in error.

By the Court.—BENNING, J. delivering the opinion.

The first question in this case is, whether the equity of redemption, in any of the lots of land, became merged in the legal estate?

It is alleged in the bill, that with respect to a number of the lots, these two estates met in Lawton and Cheever; and this allegation, it is insisted by the Counsel for the plaintiff, has not been fully denied by the answer. And they argue, that when the equity of redemption and the legal estate meet in the same person or persons, the law makes the former estate merge in the latter.

Whether this allegation has been denied by the answer or not, we do not find it necessary to inquire. Let us admit that it has not been.

Considering, then, the fact to be, that the two estates did, in some of the lots, meet in Lawton and Cheever, the question is, did the equity of redemption become, in such lots, merged in the legal estate?

Whether a merger shall take place or not, depends, as a general rule, upon this: whether the person in whom the two estates meet *intends* that it shall take place. In *Forbes vs. Moffatt*, the Master of the Rolls says: "It is very clear, that a person becoming entitled to an estate, subject to a charge

for his own benefit, may, if he chooses, at once take the estate and keep up the charge. Upon this subject a Court of Equity is not guided by the rules of Law. It will sometimes hold a charge extinguished, where it would subsist at Law; and sometimes preserve it, where, at Law, it would be merged. The question is, upon the intention, actual or presumed, of the person in whom the interests are united. In most instances, it is, in reference to the party himself, of no sort of use to have a charge on his own estate; and where that is the case, it will be held to sink, unless something shall have been done by him to keep it on foot."

"The first question, therefore, is, whether John Moffatt has done any thing to determine that election—which he undoubtedly had—if not, the question will be, upon the presumption of Law, under the circumstances of the case." (18 *Ves.* 390.)

This statement of the Master of the Rolls is supported by several cases which he cites, and also by some cases which have been decided since the decision in the case in which the statement was made, as these: (*Wigsell vs. Wigsell*, 2 *Sim. & S. Ld. Clarendon vs. Barham*, 1 *Y. & Coll. C. C.* 688, (*as stated in Chitty's Eq. Dig.* 788, 14.) *Reddington vs. Reddington*, 1 *Ball & B.* 131, (*as stated in same.*) *Pitt vs. Pitt*, 1 *Turn. & R.* 184.)

And with this statement accords a decision of this Court—the decision in *Jackson vs Tift*, (15 *Ga. R.* 557.) In that case, Jackson, the mortgagee, became the purchaser of the equity of redemption in the two halves of the mortgaged lot of land. The facts were such as to require the presumption, that he intended the equity of redemption, in one of the halves, to merge; but the equity of redemption, in the other, not to merge. The decision was, that as to the first mentioned half, there was a merger; as to the other half, none.

[1.] We think it therefore safe to say, that as a general rule, merger does not take place, if the person in whom the two estates meet *intends* that it shall not take place.

That being so, the question becomes this: did Lawton and

Cheever intend, in this case, that their equity of redemption should merge in their legal estate?

[2.] [3.] And the answer to that question must be, no; for they took from the mortgagee, Thomas, not a conveyance to the land, but an assignment of the mortgage; they stepped into the place of Thomas in the foreclosure suit; they prosecuted that suit to judgment and execution; they tried to sell under the mortgage *fi. fa.* *all* of the mortgaged lands; and they did sell a part of those lands—the very part in respect to which the bill insists, that there was a merger, viz: that part in which they, themselves, had the equity of redemption. Now the whole of this course of conduct, on their part, was inconsistent with an intention that there should be a merger. It follows, that there was no such intention.

And if there was no such intention, there was no merger; for as we have seen, there is no merger where the intention is, that there shall be none.

Was the judgment of foreclosure binding on the plaintiffs, as they were not parties to it?

The only party defendant to the judgment, was Casey the mortgagor. But the plaintiffs were the purchasers from Casey, of parts of the property contained in the mortgage; and they assert no right, except such as they derived from him by that purchase. And they could, by that purchase, derive from him no right as against the mortgage, which he, Casey, did not himself possess. And he did not, himself, possess the right to put the mortgaged property in a situation which would render it necessary for the mortgagee, in framing his suit of foreclosure, under the Judiciary Act of 1799, to make, as a party defendant to the suit, any other person than the mortgagor himself. That Act says: "The method of foreclosing mortgages on real estate, in this State, shall be as follows: Any person applying and entitled to foreclose such mortgage," "shall petition the Superior Court," "stating the case and the amount of his, her or their demand, and describing such mortgaged property; and the Court shall grant a rule, that the principle, interest and cost shall be paid into

Court," "which rule shall be published" "or served on the mortgagor, or his special agent," &c. It is only the "*mortgagor* or *his* special agent," that the rule is to be served on. The mortgagor, therefore, has no right so to treat the mortgaged property as to make it necessary for the mortgagee, in order to get a foreclosure, to serve his rule upon any person except him, the mortgagor. But this right the mortgagor would have, if he could, by selling the mortgaged property, give to the vendee the right to be a party to a rule for foreclosure. The right to be a party to that rule, the mortgagor, therefore, cannot give to his vendee.

[4.] It follows, that the vendee is bound by the judgment of foreclosure, although not a party to it. He is, however, in privity with the vendor, who is a party to it.

And this is no more than what is true in analogous cases. A *general* judgment binds the property of the defendant to it, in whose soever hands the property may be found, if it got into those hands at any time after the lien of the judgment had fastened itself upon it, notwithstanding that the person into whose hands it may have so got had never, in fact, heard of the judgment.

When the mortgagor sells parts of the mortgaged property at different times, to different persons, can these persons compel the mortgagee to go, for his money, first, to the property remaining unsold in the hands of the mortgagor; and if that should prove insufficient, then to the parts of the sold property, in any particular order of precedence?

The mortgagee, by the terms of his mortgage, has the *legal* title, equally, to every part of the mortgaged property; i. e. he has, if the mortgagor, himself, had that title to mortgage; and this legal title the mortgagee cannot be deprived of by any thing except some act of his own. Therefore, he cannot be deprived of it by any act of the mortgagor's—as, a sale of the property by the mortgagor. And hence, if there be a failure to pay the mortgage debt, and therefore, a forfeiture of the mortgage, every part, equally, of the mortgaged property, even though some of it may have been sold by the

mortgagor, becomes, at Law, to him and his vendee, of such part, *dead*. And being thus dead to them, at Law, on what terms is it to be made alive in Equity? Only on the terms of the payment of the mortgage debt. Further than this, equity, itself, will not interfere with the legal rights of the mortgagee. (*See* 2 *Black. Com.* 158. *Code on Mortgage*, 513, 517.)

This is the doctrine of the old law. And what change, in the old law, has been made by the new—by our Statute? In respect to the right of redemption, none. Before the mortgagor can, by the new law, redeem his land, he has to pay the mortgage debt; and that was the very thing which he had to do by the old law, before he could redeem his land. The change made by the new law, is merely as follows:

By the old law, the effect of foreclosure, was to vest the mortgaged property absolutely in the mortgagee; by the new, the effect of foreclosure is to vest in the mortgagee the right to sell that property and to take as much of the proceeds of its sale as shall be sufficient to pay him his debt and costs. This change does not at all enlarge the terms on which the mortgagor may redeem. Notwithstanding this change, he must still, before he can redeem, pay the debt. Previous payment of this, the new law requires explicitly and peremptorily. Its language is: "and the Court shall grant a rule, that the principal, interest and cost shall be paid into Court within twelve months thereafter;" (now by the next term;) "and unless the principal, interest and costs be so paid, the Court shall give judgment for the amount which may be due on such mortgage, and order the property mortgaged to be sold in such manner as is prescribed in cases of execution, and the money shall be paid to the mortgagee or his Attorney: but where there shall be any surplus, the same shall be paid over to the mortgagor or his agent." Unless the principal, interest and costs *be so paid*, the Court *shall* give judgment for the amount due on the mortgage, *and* order the *mortgaged* property to be sold in such manner as is prescribed in cases of execution.

The Statute then gives to the mortgagee the right to sell, under his judgment of foreclosure, any part of the mortgaged property, at his own election. A Court cannot interfere with a right thus given; certainly not further than to compel the mortgagee to take his money, if it should be tendered to him, and then to desist from any proceeding to sell the property.

[5.] This being so, a Court of Equity could not, at the instance of purchasers from the mortgagor of the mortgaged property, compel the mortgagee to resort, first, to the property remaining in the hands of the mortgagor; and then, according to some order of priority, to that in the hands of those purchasers.

And this, in part, is what a Court of Equity is, in this case, asked to do. The equity of redemption, not having become merged in the legal estate, the defendants, Lawton and Cheever, as transferees of the mortgage, stand in the shoes of Thomas, the mortgagee. They, therefore, are to be considered as mortgagees. Considered as mortgagees, they are entitled to have payment of their debt before they can be required to abstain from selling, at their own election, any of the lands mortgaged to them. On the other hand, the plaintiffs are the purchasers of parts of the mortgaged lands from Casey, the mortgagor.

They, therefore, stand in the shoes of Casey, and so are to be considered as mortgagors. Considered as mortgagors, the only right which they have, as against the mortgagees, is the right to redeem their land on payment of the mortgage debt.

Such a right as that, does not give them a title to ask a Court of Equity to compel Lawton and Cheever, considered as mortgagees, to bring the parts of the mortgaged property to sale in any particular order.

After Lawton and Cheever shall have been paid the amount due on the mortgage, then those who pay that amount may raise the question, who, if any, are to contribute to their re-imbursement; and in what order and proportion they are so to

contribute. On this question, nothing is now intended to be said.

I will, however, suggest for inquiry on this question, whether, when (e. g.) a mortgagor sells a part of the mortgaged property, the remaining part is the part which, as between vendor and vendee, is to be first applied to the payment of the mortgage, does not depend on the *intention* of vendor and vendee. Suppose A, having property worth $10.000, with a mortgage on it for $5.000, sells half of it to B for $2.500; the intention of both A and B, being that the other $2.500, which this half is worth, shall be paid by B, the purchaser, to the mortgagee, in satisfaction of half of the mortgage. In such a case, if B should pay that $2.500 to the mortgagee, ought B to be allowed to call on A to pay an equal amount to him? And in such a case, would not the fact, that the half of the land sold, was sold for but half its unincumbered value; i. e. was sold for all its value, less its share of the incumbrance on it, be *evidence* of an intention, in both vendor and vendee, that that half of the land was to pay its half of the mortgage? I think, in practice, it is true, in general, that when a mortgagor sells a part of the mortgaged property, he requires and obtains for it a full price—a price equal to what would be the value of the part, if it were free from incumbrance. And if, in such a case, the vendee, on losing his part by the operation of the mortgage, is entitled to contribution from the vendor, is it not because there was an intention, in both vendor and vendee, that the vendee should have contribution, an intention of which the payment of this full price is the *evidence?*

The bill states that Lawton entered into a fraudulent contract with Clifton, the holder of one of the lots included in the mortgage, to prevent him from "running the land;" a contract by which Lawton agreed to protect Clifton's title to that lot, against the mortgage, or to compensate him for the loss of the lot, in case it should be sold by the mortgage; and that Clifton, who had commenced to bid for lot No. 281, in consequence of this agreement, desisted from bidding, and

let the lot be knocked off to Lawton at $300, when it was worth $2.500; and when he would, himself, have given $2.-000 for it but for the agreement; and that, by the agreement, Clifton was also made to abstain from bidding for another lot.

Now, it seems that the sale at which this agreement (as it is stated in the bill to have been) took place, was a regular, public sale, after due advertisement, under the judgment of foreclosure; a judgment to which the complainants, if not parties, were privies. It is to be presumed, therefore, that they were present at the sale, and might, if they had seen fit, have made every piece of land fetch its full value. And it does not appear but that, at the time of sale, they knew or suspected, what was going on, as they say, between Lawton and Clifton.

Suppose, therefore, the allegations in the bill be taken to be true; to what relief do they entitle the complainants? The most that a Court of Equity, in such a case, would do, would be to annul the purchase of the two lots by Lawton or Lawton and Gheever, and order another sale of them—a sale just like that was, at which the annulled purchase had been made. A court of Equity *could not* make Clifton compete for the lots; or, indeed, make Lawton and Clifton cease from *acting on* their old agreement. So that, at the new sale, if one were ordered, the complainants would not, in a single respect, be any better off than they were at the old.

The equity, then, that is in this statement of the bill, is not very strong. But if it were stronger, it could not be of any avail to the complainants, for the answer denies the truth of the statement.

For aught that appears then, taking both bill and answer together, the lands which were sold by the Sheriff, under the judgment of foreclosure, were fairly sold. If so, the prices they sold for, are the sums to be credited on the mortgage debt.

And this disposes of all the questions in the case that

ought to be disposed of, considering what is the present state of the case.

The result of all that has been said is, that the dissolution of the injunction by the Court below was right.

No. 66.—JAMES S. MILLER and others, plaintiffs in error, *vs.* IRVIN J. SAUNDERS and others, defendants in error.

[1.] If complainants put into the shape of a supplemental bill, that which properly should be in the form of a petition for an interlocutory order, the Chancellor should not, on that account, turn the case out of Court. He may, perhaps, shape his order so as to grant what is asked, notwithstanding the form of the proceeding, if he find that justice requires it; or he may direct an amendment, in point of form.

[2.] Though the complainants inaccurately denominate the writ which is asked for, "*a writ of quia timet*;" yet, if the prayer be such as is otherwise proper to *a bill of quia timet*, and the proceeding be sufficient in other respects, the Chancellor may act upon it.

[3.] When such a proceeding is based upon an original bill, and when it sets forth that the allegations of that bill show the right of the complainants to recover, without setting forth these allegations, and without annexing said bill, the proceeding is deficient.

[4.] Such a proceeding is also deficient, if it require bond and security of the defendant for his appearance with the property, &c. and yet fails to set forth the value of that property, or the amount for which suit is brought.

In Equity, in Dougherty Superior Court. Decision by Judge PERKINS, at June Term, 1855.

Irvin J. Saunders and others filed a bill, supplemental to a former bill, alleging, that they had filed the former bill to recover certain negroes, and that "the charges and allegations in said bill, are such as entitle them to recover;" and that they had charged that said defendants had combined, by levy and sale under a certain *fi. fa.* to defraud complainants;

and that they had obtained an injunction restraining any farther proceedings against said negroes, until final order and decree on the bill. This bill charged that Miller's land had been levied on and was about to be sold; that Miller had sent three of the negroes out of the State, and speaks of going himself; that they have reason to fear, and do fear, that Miller intends and will run off said negroes out of the State. The prayer was for a writ of *quia timet*, to arrest Miller and the negroes and them keep, until he gave bond and security, that the negroes will be forthcoming, to answer the decree in this cause.

To this bill James S. Miller demurred, on various grounds—

1st. Because the allegations are too uncertain and indefinite.

2d. Because complainants refer to another bill or proceeding, without attaching the same as an exhibit.

3d. Because the bill does not set forth the material allegations, in the bill to which it is supplemental.

4th. Because there was no order or leave of Court first had, before the filing of this bill of *quia timet*.

5th. Because there was an adequate Common Law remedy.

6th. Because the affidavit of complainant to said bill, is insufficient.

This affidavit stated, "that the facts stated, so far as they are charged, of his own knowledge, are true; and so far as charged on information, he believes them to be true; and that he verily believed and feared, that James S. Miller intends to abscond from the State, and take off with him all the property in his possession, which he can move, unless prevented, by process, from doing so."

The Court below over-ruled the demurrer, and this decision is assigned as error.

STROZIER & SLAUGHTER, for plaintiffs in error.

WARREN & WARREN, for defendants in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] Accurately, this is not a case in which a supplemental bill should be filed. It would have been better if the proceeding had been by petition, praying an interlocutory order. But this objection does not touch the merits of the case, and is little more than a question of form. If the complainants were entitled to have their prayer granted, the Chancellor might, even in this proceeding, so shape his order as to grant what is asked. It would have been hardly just, therefore, for him to have turned these complainants out of Court on this ground, though he might have directed an amendment, in point of form.

[2.] It is true, too, that correctly speaking, there is no such writ as *a writ of quia timet.* But this, also, is mere irregularity as to form. In point of substance, the writ asked for here, is a writ of prevention, to accomplish the ends of precautionary justice; the prayer is for such an interposition of the Chancellor as will prevent irreparable mischief; and such is the office of *a bill of quia timet.* Hence, although the form be inaccurate, in praying for *the writ of quia timet;* yet, if the proceeding be sufficient, in other respects, the Court may act upon it. Is the proceeding otherwise sufficient?

[3.] We are of opinion that it is not; because, in the first place, this proceeding rests upon the first bill as a basis, whatever may be its form; and the facts contained in that first bill are not set forth, nor is that bill made an exhibit; nor does it appear any where in the record before us. The pleader has contented himself with a general reference to that bill, as having been filed, and with a statement, that "the charges and allegations in said bill are such as entitle them to recover." What these allegations are, does not appear; and we are, consequently, not enabled to say whether this statement be correct or not. Nor does it appear, whether or not the first bill was before the Chancellor when the order

was granted. And therefore it is, that according to the record, that judgment has been improvidently rendered.

[4.] But there appears to us another reason why this is so. Admitting that it is shown that these complainants are entitled to recover these slaves, and hire for them, at the rate of twelve hundred and twenty dollars a year; yet, they have not stated, any where in the record, what is the value of the slaves, nor for how many years they are entitled to recover hire, nor how much, in the aggregate, they are thus entitled to recover. So that no guide or measure is afforded to the Sheriff, by which he may determine the mount of the bond and arrange the security.

On this ground also, the judgment should be reversed.

No. 67.—NOAH MCNABB, plaintiff in error, *vs.* LOCKHART & THOMAS, defendants in error.

[1.] The undertaking by a party to receive money and deliver it to another without reward, is a mandate; and in contracts of this sort, the mandatory is liable for gross negligence only; and the burthen of proof is thrown upon the plaintiff, at least, to make out a *prima facie* case.

[2.] Negligence is ordinary, less than ordinary, or more than ordinary; and he who omits even slight diligence, fails in the lowest degree of prudence, and is deemed grossly negligent, viz: omitting that care, which even the most inattentive and thoughtless men never fail to take of their own concerns; his conduct being, in legal language, *dolo proximus*, or amounting almost to a fraud.

[3.] He who accepts a burden gratuitously, is not to be dealt with as one who receives a benefit; and whether he has been grossly negligent, is a fact to be determined by the Jury, under all circumstances of the case.

[4.] Great latitude is allowed to Counsel, both by the Common Law and the Courts of this country, in forensic discussions; and liberty of speech must not be too much abridged.

[5.] What a party says, as to the ownership of money, when he delivers

a packet to be carried from one place to another, is admissible as a part of the *res gestae.*

[6.] In an action against a voluntary bailee for the loss of money by carelessness and negligence, the defendant may give in evidence his own acts and declarations, immediately after the loss, to repel the charge.

[7.] Every action is properly brought in this State, regardless of its form or name, which sets forth plainly, fully and distinctly, the plaintiff's cause of action.

[8.] In an action against a mandatory, for the loss of money intrusted to his care, he cannot be sworn as a witness in his own defence, that is, to prove that the loss was not occasioned by his own neglect, carelessness or mismanagement.

[9.] Where, from the nature of the case, other evidence was not to be obtained, and there would be a failure of justice without the oath of the party, ought he not to be allowed to testify? *Quere.*

[10.] Where a depositary is sued for the loss of money, and it is proven by the plaintiff, that immediately after, he was buying and selling, and handling funds, in order to create a presumption that the defendant had embezzled the fund, it is competent to show, by way of rebuttal, his pecuniary circumstances before the alleged loss.

[11.] In a suit for the loss of money, committed to the custody of the defendant, involving the general character of the party, as it does, and going directly to affect it, it is competent for the defendant to give in evidence his general character for honesty and trustworthiness.

Assumpsit, &c. in Dougherty Superior Court. Tried before Judge PERKINS, May Term, 1855.

This was an action brought by Lockhart & Thomas against Noah McNabb, for a sum of money entrusted to his care, and which he never delivered, but alleged had been lost. The following evidence was submitted and exceptions taken. Error has been assigned on all of these exceptions:

The depositions of NELSON P. FOSTER: In the latter part of December, in the year 1850, or in the early part of the following January, 1851, I received from Mr. John Jackson, then a merchant in Albany, in said county of Baker, Thirty-four hundred and eighty dollars, in bank bills, three thousand of it done up in five hundred dollar parcels and the remainder loose; this was done in said Albany; said John

Jackson told me at the time, the money belonged to Lockhart & Thomas, the plaintiffs in this case, and requested me to deliver it to them in Apalachicola, Florida, which I promised to do, as I was going there on a Steamboat of which I was Captain; but the water in the river (Flint) fell so much that I was detained on the way two or three weeks; and seeing that I would not reach Apalachicola in some time, I delivered all the money to James G. Johnson, then a merchant in Newton, in said Baker County, in obedience to the annexed order, signed by Lockhart & Thomas, and took said Johnson's receipt, which is also hereto annexed. This receipt shows the date of the transaction, and I would state that to be about the time, from my recollection alone.

I know that the said money belonged to said Lockhart & Thomas, only by being told so by said Jackson, from whom I received it. I know the amount of it, because I would not give my receipt for it until I had counted it; and said Jackson broke the package to enable me to count it, which I did in his presence. The seals of the package were, however, as well as I recollect, broken before I saw it, and was tied up with a string.

If the plaintiff's Attorneys, or either of them, ever mentioned this case, or anything in relation to it, to me or in my hearing, I do not remember it. Before my arrival at Apalachicola, a few days after I delivered the money to said Johnson, as stated in my answer to the direct interrogatories, I informed Mr. Thomas of a rumor which I heard on my way down, that the money had never reached Bainbridge, and that the defendant, then a stage driver, said that he had lost it. I remember no further conversation as ever having occurred between said Thomas and myself, on the subject, at any time. Since, Dr. Lockhart told me that he wished me to answer, some interrogatories which had been taken out for me to answer, in relation to the delivery and the amount of the money in question. I promised to do so, and he showed me to the place where I am now, before the Commissioners; he

then left immediately. This is all the conversation I ever had with him on the subject. There has not been, and is not now, any person present at my examination, except the Commissioners, Josephus Echols and John J. McKindree. I did not know who the plaintiff's Attorneys were until this examination commenced, and I saw their names to the interrogatories; I never received a letter, nor even a message of any kind, from any person in reference to said money; I know nothing, whatever, about the taking out of the interrogatories, nor know how they came to be taken; I suppose, however, that they were taken out for the purpose of making me a witness for the plaintiff.

To the reading all of that portion of said answers, as giving the sayings of John Jackson, defendant, by his Counsel, objected; which objection the Court over-ruled, and defendant excepted.

To which answers was the following receipt and order, copies of which are as follows:

STEAMER ALBANY, February 3, 1851.

Received from Nelson P. Foster, Captain of the Steamer Albany, Thirty-four Hundred and Fighty Dollars, for Lockhart & Thomas, of Apalachicola, Fla.

JAMES G. JOHNSON.

APALACHICOLA, February 3, 1851.

Captain Foster, of the Steamer Albany, will please pay Mr. J. G. Johnson Thirty-four Hundred and Eighty Dollars, received from Mr. John Jackson, of Albany, Ga., to be delivered to us, and his receipt for the same shall be binding on us. LOCKHART & THOMAS.

JAMES G. JOHNSON: The receipt annexed to the answers of Foster was the one given by him to Foster, and that he received the money mentioned in the receipt, and that he delivered to the defendant all the money he received; counted four or five packages, and each of them counted, contained

five hundred dollars; and for that reason he supposes that all the packages contained the same amount, except one which counted, $480; there were six or seven packages; those he counted held out. He delivered the packages to be delivered to John M. Potter, of Bainbridge, and defendant undertook to deliver it, and was informed of the amount and consented to take it; and said he would not carry any more money, but upon some other conversation, finally agreed to take the money; at first, he told Johnson he did not intend to carry any more money; Johnson told him he was sorry for it, and after some conversation, consented to carry it.

Defendant proposed to ask Johnson, in his cross-examination, if John Montgomery had not told him, the same morning that the money was delivered, that he had a message to him from McNabb, and that was, that he had lost the money; that he wished him (Johnson) to go and look in the stables and down to the river for the money; which question the plaintiff objected to, and which objection the Court sustained; to which ruling, the Counsel for the defendent excepted.

The depositions of JOHN M. POTTER: Defendant had delivered no money to me since the 7th day of February, 1851; I do not know that the defendant promised to receive from James G. Johnson of Newton, and deliver to me at Bainbridge, as the agent of plaintiff; and as before stated, he has delivered no money to me since the 7th day of February, 1851. The defendant was stage driver in the employ of F. K. Wright. There was no promise made to deliver any money to me as agent for plaintiff; nor was I to pay defendant any thing for bringing the money to me.

Defendant has frequently brought packages of money safely to me, and conveyed packages from me to Newton, while employed in driving the stage between Bainbridge and Newton; have never lost any thing through him nor known of any others losing, except the plaintiff. I know nothing more that would benefit the defendant.

In all cases, when I have handed defendant packages of money to be conveyed to Newton, he has placed them care-

fully in his pocket, generally in the breast of his coat. In other respects, I have thought him careless; my opinion of him was formed from all transactions I had with him.

The plaintiff closed his case.

Defendant then moved a non-suit, which motion the Court over-ruled, and defendant excepted—1st. Because the plaintiff had no right to recover in this form of action, but if he had any remedy, it was by action of trover. 2d. Because it was shown, by the evidence, that the money was lost, and the plaintiff had shown no negligence on the part of defendant. 3d. Because the plaintiff had not alleged in his declaration, nor proven by the evidence, gross neglect in the defendant; or, in fact, any negligence whatever, which is necessary. 4th. Because the evidence showed that it was delivered to a mail carrier, which was contrary to public policy, and a fraud upon the law.

EVIDENCE FOR DEFENDANT.

Depositions of JOHN MONTGOMERY: He was at the ferry when the defendant came up; it was about the last of February, he thinks, and about nine o'clock in the morning. Defendant came on horse-back, in a gallop, and in a hurry; and from the appearance of his horse, he had rode very fast. Defendant told witness he had lost some money that Mr. Johnson had sent by him to carry to Bainbridge, and that he had come back to hunt it. He told witness, if he found that money he would never be caught carrying money for any body else, as long as he lived. He requested witness to go and tell Mr. Johnson that the money was lost, and for him (Johnson) to go and hunt about the stables where he (defendant) had been. He then told witness that he would return and search down the road, and that he was sorry that he had no one to attend to the stage, that he might look better and longer for it. Witness says that there was something unusual about his manners; he rode by witness without speaking to him—a thing which he never did before—and kept looking

from one side to the other of the road, and appeared to be very uneasy about something. Witness was sitting about 60 feet from the river, on the other or east side, when defendant rode by him; and when defendant came to the bank of the river, he appeared frustrated and looked up and down the river, and then turned and looked to witness, when witness asked him what was the matter; he then told witness what has been stated above about the money; he remained with the witness five or ten minutes. Witness has answered what message was sent by him, and says that he delivered the message to Mr. Johnson. Defendant said he must return to the stage, for he had no one to attend to it for him, and he left witness to go back to the stage, as he said; witness has stated, already, the circumstances, as nearly as he recollects, of defendant coming to the river.

JAMES G. JOHNSON: Swore, that Montgomery, the same morning that the money was said to be lost, came and told him what McNabb had said to him about the loss of the money, and that he wished him to go and look in the stables for it; and he received the message from Montgomery between breakfast and dinner hours of the same morning that the money was delivered; does not recollect the exact time of the day.

The depositions of JOHN M. POTTER: On the day the package was lost, the stage arrived in Bainbridge about 4 o'clock, P. M. as well as I can recollect, which was later than usual. On its arrival, Mr. McNabb came to me and asked me if I knew anything of a package from Newton; he said one had been handed him to bring to me, and it was missing or lost. He discovered that it was lost after he had passed a road leading to a ferry near Maples', at which point a passenger got off, who was sitting on the box with him. As soon as he discovered that the package was gone, he said he turned about the stage and went back to the ferry at Newton, and called to some one to go to Johnson's and tell him that he had lost the package. I think he said, to say to Johnson to

go to the stables and look. I understood it was a package, and but one; and he came to me as soon as the stage arrived.

I have always thought favorably of his character and of his trustworthiness, though, at times, I have thought him a little careless.

I have no recollection of the defendant telling me the money was lost by his carelessness. I think that something was said about the package being put in his outside pocket; cannot say that the pocket was exposed. He appeared uneasy and anxious about it; cannot say that he proposed to me to go and hunt it. He went on, I think, the same day, to Quincy, with the stage. Can't say that I know that he loves money better than other people. I think he kept a livery stable here, or was connected with one. I think, since the package was lost, he sold a negro fellow to John M. Cole; and after the package was lost, I think he quit driving the stage. Soon after the package was missing, he was here in Bainbridge, I think for some time, and dressed well, and attended balls. I thought him prudent, but not remarkable close with his money. During a part of the time he lived in Bainbridge, he drove fine horses; and he lost a horse for which, I think, he asked a large price—a bay horse, I think—price some three hundred dollars. Soon after the loss of the package—a few days—cannot recollect how many, he went from Bainbridge towards Tallahassee, with a pair of horses and a buggy. I remember seeing him at a ball on the 14th of February, 1851; I cannot say that it was the first time he had done so. Can say, that at the time the package was missing, he showed some uneasiness and anxiety about it; that shortly after, he left the stage line, and not much was said by me on the subject.

The depositions of WILLIAM A. MOTT: Mr. Lockhart, of the firm of plaintiffs, had a conversation with witness about the loss of the money, the subject-matter of the above suit, in Bainbridge, shortly after the money was lost. Mr. Lockhart asked witness what he knew of the character of one James Woodall, of Baldwin County; witness then told said

Lockhart, that said Woodall was a trifling looking man, and sometimes thought to be crazy. At the same time, Mr. Lockhart asked witness about defendant; witness replied that he had not been acquainted with defendant but a short time, and did not know what sort of a man defendant was. Mr. Lockhart then told witness, that as he (witness) lived in Baldwin County, if he would detect the matter, he would pay him five hundred dollars; and requested witness, if he saw Woodall paying any money about Milledgeville, to notice it and write to him, (Lockhart,) but witness did not see Woodall in 6 or 7 months after this.

The inference that witness drew from the conversation of Mr. Lockhart, as before stated, was, that Lockhart felt that there was a probability that Woodall had got the money; as said Lockhart said that said Woodall was on the box of the stage with the defendant on the trip that the money was lost. Both plaintiff Lockhart and defendant asked witness to keep an eye out and see if said Woodall handled any money, and write to them; did not particularly watch the conduct of said Woodall; but when he did see him, Woodall had a twenty dollar bill and some other money, and was very drunk. Witness thought at the time, that the money was on the St. Mary's Bank—did not inform the plaintiff of the fact. Said Woodall is any thing but a moral man—is a drunken, intemperate man, and is thought, by many, to be deranged at times.

Witness cannot say that the money he saw Woodall have, was the money that belonged to plaintiff. Mr. Lockhart told witness, in the same conversation, that he did not believe that the defendant had lost the money; that it was too large an amount to be handled carelessly.

William Farnsworth: Says that he was mail stage agent at the time, of that part of the road over which defendant drove, and that he recollects the coat; that it was the one he usually wore when driving the stage, and that he knows of no other coat worn by defendant; had an inside breast pocket, but the bottom of it had been cut out before the loss of the money, in consequence of having adhered by having a piece

of india rubber melted in it, and which closed up the pocket and caused him to have to cut it out. The defendant then offered to prove, by Farnsworth, his character for trustworthiness, and that the defendant was in good circumstances, pecuniarily, before the loss of the money, to which plaintiff objected; and the Court sustained the objection and ruled out the evidence; to which the defendant excepted, and alleges error.

Defendant then proposed to prove by said witness, Farnsworth, that the defendant left the stage line for the purpose of attending to his own or private business, and that the arrangement was made for him to leave previous to the loss of the money. To which plaintiff objected; and which objection the Court sustained, and ruled out the testimony. To which the defendant excepted.

JAMES G. JOHNSTON: Says the coat the defendant had on was a worsted sack coat, with side pockets on the skirt, and usually worn by the defendant; does not know the depth of the pocket. When the witness gave the money to the defendant, he put it in his breast side pocket, and immediately took it out and put it in the right hand outside pocket of his coat, and that was the last that he saw of the money; cannot say that any of the package showed above the pocket; it was a large package; too large to be carried in the pantaloons pocket; and upon the return of stage and defendant from Bainbridge he saw the coat, which was the same one that he had on when he received the money, and the inside breast pocket was cut out, in which he first put the package when witness handed it to him.

Defendant then offered to introduce himself as a witness, to prove the loss of the money, and the circumstances under which the loss took place. To which plaintiff objected; which objection the Court sustained, and the defendant excepted, and alleges the same as error.

The testimony being closed, Counsel for the plaintiff addressed the Jury; and in the concluding speech of the plaintiff's Counsel, he stated to the Jury that it was proved that the defendant had but one coat before the loss of the money;

nd soon afterwards, he was purchasing and selling horses
d buggies, and negroes, and livery stable. Counsel for
efendant objected to the statement, as not being in proof,
laintiff's Counsel insisting that it was. Defendant's Coun-
el then asked the Court to correct plaintiff's Counsel, when
e Court stated, that as Counsel differed as to the testimony,
ach one insisting as being right, he would leave it to the
ury; and Counsel for plaintiff continued his argument and
epetition of said statement. To which refusal, said defend-
nt excepted, and alleges the same as error.

The Court then charged the Jury. To all of which charge
nd refusal to charge, defendant excepted. Which charge
nd refusal to charge appear, in full, in the rule *nisi* for new
rial.

The Jury then returned a verdict for the plaintiff; where-
on, Counsel for defendant moved for a new trial on the
rounds—

1st. Because the Court erred in not charging the Jury,
hat a mandatory was only bound to slight diligence and such
are as he took of his own goods.

2d. Because the Court erred in all the charges as given.

3d. Because the Court, in lieu of the charge as given,
hould have charged the Jury, that a stage coachman, with-
ut pay, is not liable, unless there has been great carelessness
n his conduct.

4th. Because the Court refused to charge the Jury, that
ending the package by a stage driver, without pay, and who
as carrying the U. S. Mail, was illegal and a fraud upon
he law.

5th. Because the Court permitted the plaintiff's Counsel to
ake statements to the Jury, while in conclusion, as having
een proved, which was not warranted by the testimony; and
efused to correct him.

6th. Because the Court erred in permitting the sayings of
ohn Jackson, as sworn to by Foster, to go in evidence.

7th. Because the Court erred in refusing to permit defend-

ant to show, in his cross-examination of James G. Johnson, that he was informed by Montgomery of the loss of the money by defendant, and requested to look for it.

8th. Because the Court erred in over-ruling the defendant's motion for a non-suit.

9th. Because the Court erred in not permitting the defendant to show, by James G. Johnson, that it was with great reluctance that the defendant took the money, and that it was through his, witness', earnest persuasion that defendant took the money.

10th. Because the Jury found a verdict contrary to evidence, and contrary to Law and Equity.

11th. Because the Jury found contrary to the weight of evidence.

12th. Because the Jury found without evidence.

13th. Because the verdict is inequitable, erroneous and contrary to public policy.

14th. Because the Court erred in over-ruling the motion of defendant, to be sworn as a witness to prove the loss of the money and the circumstances connected with it.

MORGAN; STROZIER, for plaintiff in error.

R. F. LYON, for defendants in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] [2.] [3.] We deem it unnecessary to notice, separately, the various assignments of error upon the charge of the Court. The Court instructed the Jury, in substance, that the undertaking by a person to receive money and deliver it to another, without reward, is a mandate; and in contracts of this kind, the mandatory is liable for gross negligence only; and the burthen of proof is thrown upon the plaintiff, at least, to make out a *prima facie* case. That negligence was ordinary, less than ordinary or more than ordinary; and

that he who omits even slight diligence, fails in the lowest degree of prudence, and is deemed grossly negligent; that is, omitting that care which even the most inattentive and thoughtless men never fail to take of their own concerns. That gross negligence was *dolo proximus*, amounting almost to a fraud. That he who accepts a burden gratuitously, is not to be dealt with as one who receives a benefit; and whether the defendant had been grossly negligent, was a fact to be determined by the Jury, under all the circumstances of the case.

As a whole, we think the charge unexceptionable; and that it covers, substantially, all the requests which were made by the defendant.

[4.] The next assignment of error is, that the Court permitted plaintiff's Counsel to make statements to the Jury, while in conclusion, which were not warranted by the testimony; and refused to interpose when called upon to do so.

Upon looking into the record, we are obliged to say, that while there was some evidence as to the points respecting which Counsel was addressing the Jury, yet, the facts were rather over-stated; not sufficiently so, however, to authorize a new trial on that ground.

There is, moreover, an inherent difficulty upon this subject, under the Act of 1850, which forbids a Judge, either during the progress of the trial or in his charge to the Jury, to express or even to intimate his opinion as to what has or has not been proved. Suppose Counsel insists that such and such facts have been proved, how can the Court undertake to correct him without violating this Statute?

Great latitude, after all, is allowed to Counsel, as well by the Common Law as by the Courts of this country, in forensic discussions. And it will not do to abridge liberty of speech too much; "no pent up Utica" is the motto, certainly, in republican governments.

As the members of Congress are wisely protected by the Constitution of the United States, from being called to account for any thing said in debate, so Counsel, in their place,

in the discharge of professional duties, may use language, if pertinent to the cause, which would be considered wholly indefensible elsewhere. There is a limit, however, to this privilege. And respectable Counsel, unless inadvertently, will never indulge in speaking to facts not in evidence; or in confounding inferences and opinions with facts. Should this practice be deliberately and habitually pursued, while it is, doubtless, the duty of the Court to prevent any such abuse in a plain and palpable case; still, such offenders should be held amenable to a just, and often more efficacious, punishment: and that is, the discountenance of their professional brethren, whose frown of disapprobation is the surest of all inflictions to a high-minded lawyer. And such only should be permitted to occupy a place at the bar.

[5.] We think the Court was entirely right in suffering the witness, Nelson P. Foster, to testify as to what John Jackson said to him about the ownership of the money, at the time the packet was delivered to the witness to be carried to Apalachicola. It was a part of the *res gestæ*.

[6.] We hold it was error in the Court below, not to allow the defendant to show, upon the cross-examination of James G. Johnson, that John Montgomery had told him, the same morning that the money was delivered to the defendant, that he (Montgomery) had a message to him from McNabb: and that was, that he had lost the money, and that he wished him (Johnson) to go and look in the stables, and from thence down to the river, for the money.

Montgomery swears that McNabb rode hastily back to the river, seeming much disturbed, and communicated to him the loss of the packet, assigning as a reason for not going back to the stables himself, that he had left the stage, with the mail in it, with no one to take care of it. He begged the witness to notify Mr. Johnson of the occurrence, and ask him to make search for the money.

It is contended that to allow this proof, is to permit the party to manufacture evidence for himself. But this is not true. It is the evidence of circumstances attending the trans-

action. Direct proof of the loss of this money, is not to be expected. The circumstances, therefore, that would naturally attend or charactorize the conduct of a man placed in the situation in which McNabb stood, is, from the necessity of the case, proper testimony.

No man would be the bearer of a packet of money without reward, and at the risk of reputation and property, if he were compelled to prove the theft or loss by eye-witnesses. It would be unreasonable to look for such proof.

The conduct of the party, in connection with what he says —in other words, concurrent acts and declarations, should be received in exculpation, for what they are worth. It can only be ascertained, from such circumstances, whether the bailee was guilty of gross neglect or not. That nothing that a man says or does can be given in evidence to support his own cause, is a good general rule. It has, however, like all other general rules, exceptions; otherwise, better without the general rule.

In *Sampley vs. Scott*, (24 *Miss. Rep.* 528,) the Court say: "It is certainly true, as a general rule, that statements or admissions made by a party interested in the result of a suit, cannot be given in evidence in his favor. But the rules of evidence are adopted for practical purposes in the administration of justice, and must be applied in such a way as to promote the ends for which they were designed. And the Courts have, therefore, admitted many exceptions to the above rule. The instances in which the statements or admissions of a party have been received in his own favor, have been so frequent as to constitute it almost a rule rather than an exception, that they may be received in cases of extreme necessity, where, from the nature of the case, no better evidence can be reasonably expected." (*Citing Buller's Nisi Prius*, 289. 1 *Stark. on Ev.* 132.)

Judge *Story* says that the statements made by a mandatory, that the letter delivered to him with money in it, had been lost by accident or stolen from him, with the circumstances attending the transaction, ought to be deemed a part

of the case, so as to entitle the mandatory to the benefit of the statement at the trial, as a part of the *res gestæ*, leaving it to the Jury to disbelieve the statement and to find the defendant guilty of gross negligence, if the circumstances did not, in their judgment, repel it. (*Story on Bailments*, §213, n. 1.)

We concur, fully, with the foregoing views, and think the testimony, upon this head, was improperly withheld from the Jury.

[7.] We see no error in the fifth assignment, but affirm the judgment of the Court in over-ruling the motion for a non-suit. Every action is properly brought in this State, regardless of its *form* or *name*, which sets forth, plainly, fully and distinctly, the plaintiff's cause of action. In this instance, it is wholly immaterial whether the suit be trover, assumpsit or case. It is a general principle of the Common Law, that every person is presumed to do his duty until the contrary is established. The burthen is, therefore, upon the plaintiff, to negative this presumption. The non-suit should not have been awarded.

One of the grounds upon which the new trial was asked, and the not granting which is assigned as error is, in not permitting the defendant to show, by James G. Johnson, that it was with great reluctance that he (McNabb) took the money; and that it was through the earnest persuasion of witness that he did take it.

The record does not sustain this exception; on the contrary, it shows that the witness, Johnson, testified that the defendant at first declared, that he did not intend to carry any more money. Johnson told him he was sorry for it; and upon farther conversation, he finally agreed to take it.

[8.] Ought the defendant, himself, to have been sworn as a witness?

In *Dibble vs. Brown & Haynes*, (12 *Ga. R.* 217,) this Court held, that the evidence of the plaintiff in an action against a common carrier, for the loss of his trunk, was admissible to

prove its contents, provided there was no other evidence to establish the fact. And this evidence was admitted, not upon the ground that the defendant had committed spoliation upon the property, or *in odium spoliatoris*, but upon a policy *in favorem justitiæ* springing out of the necessity of the case and the nature of the subject. And this doctrine is abundantly sustained by authority. An attempt has been made to deny its application in cases of *necessity* alone, and in the absence of *fraud*. But the attempt thus to restrict it, has proved unsuccessful.

Would the admission of McNabb be a further and dangerous innovation upon that Common Law rule, that no person shall be a witness in his own case? The Mississippi Court, in the case already cited, held that it would not, and allowed the defendant, in a case precisely similar in all respects, to be sworn. And while I have concurred with my brethren in affirming the judgment of exclusion in the Court below, further reflection and examination have tended rather to weaken than confirm my first impressions. If a party, without benefit or reward, having undertaken to do a favor for a friend, and without any other evidence as to how the casualty arose, cannot be allowed to give evidence in his own favor, a failure of justice is inevitable. No prudent man should ever carry a letter or packet for another. Suspicion will attach, and the most upright man will be more than punished for any neglect of which he may have been guilty, by the mortification which he feels. Justice would seem to demand, that when the voluntary depository admits that, somehow, he did lose the money, that he should have the privilege of stating exactly the *quo modo* he lost it. His narrative is for the consideration of the Jury. Why exclude from them the only testimony that can shed a ray of light upon the transaction?

[9.] The books and the daily practice of the Courts, abound in instances, where the oath of the party is received as evidence in his favor, because it is essential to the purposes of justice. He proves that the books of account produced in Court, contain his original entries; the loss of a deed out of his custo-

dy, so as to let in secondary evidence; and so of other matters, of which the books of practice abound in examples. To rebut this proposition, we are met with some conjectural notions about *public policy*. For myself, I utterly repudiate all such fanciful distinctions. I am satisfied they will not abide the test of investigation.

Here is a bailee, without reward, seeking to defend himself against a presumption of gross negligence, or *something worse*; and where the facts, which constitute his defence, could, in the nature of things, be susceptible of no other proof than his own statements! My judgment refuses to acquiesce in such a doctrine.

[10.] Understanding the bill of exceptions, as we do, that the testimony, that McNabb, immediately after this transaction, was seen in the possession of property, buying and selling, &c. was brought out by the plaintiff, in his cross-examination of John M. Potter, we are clear, that by way of rebuttal, the defendant should have been permitted to show his pecuniary circumstances before the alleged loss, and his reason for leaving the stage line, the fact of his doing so being adduced as a circumstance to inculpate him.

[11.] The main ground upon which we propose to put the new trial, in this case, is the rejection of the testimony of William Farnsworth, as to the good character of McNabb for honesty and general trustworthiness. In civil cases, such evidence is always admissible, when the nature of the action involves the general character of the party, or goes directly to affect it. And whenever a particular trait of character is involved in the matter charged against the defendant, there the character of the party, in that particular trait, is put in issue, and may be given in evidence. We cannot doubt but that the character of the defendant, for want of integrity and trustworthiness, was put directly in issue by the action brought against him; and from the very nature of the case, and the difficulties surrounding it, that character must constitute his main, if not his only defence. Entire liberty should have been extended to the defendant upon this point. The time will

come, and we are fast verging to it, when the administration of justice, both civil and criminal, will turn very much upon the character of the litigating parties, their testimony being mainly looked to for the establishment of the facts upon which the law will pronounce its judgments.

Upon the whole, we think it best to remand this cause for a re-hearing. It is a mere matter of delay to the plaintiffs, if the defendant lost or embezzled their money. But if he be innocent, it is a great cruelty to make him liable for the casualty.

No. 68.—ANDREW Y. HAMPTON, plaintiff in error, *vs.* JOHN R. HAMPTON, defendant in error.

[1.] The Act of 1854, "to amend an Act for the better protection and security of orphans and their estates, approved February 18th, 1799, by extending the provisions of the fifth section thereof to trustees and their estates," gives a remedy against the *executors* or *administrators* of trustees, but none against the trustees themselves.

In Equity, in Dougherty Superior Court. Application for and sanction of injunction, by Judge PERKINS, May Term, 1855.

The bill filed, in this case, by John R. Hampton and Charles W. Horn, next friend of George W. Hampton and Elliot L. Hampton, minors, sets forth that Andrew Y. Hampton, the guardian of said John R., George W. and Elliot L. received, as guardian of said minors, in December, 1852, from the administrator of their former guardian, between five and six thousand dollars in notes and money, besides divers negro slaves, the property of said minors; amounting, in all,

to fourteen thousand seven hundred and fifty dollars, in negroes; and afterwards, to wit: on the first of January, 1853, the said guardian received four other negroes, the property of said minors, of the value of thirty-three hundred dollars; that the said Andrew Y. Hampton took into his actual possession, and had under his control and management, the aforesaid negro property, and converted to his own use, by hiring out the negroes at large rates yearly, to the amount of from two to three thousand dollars each year, and converting to his own use the proceeds arising therefrom, up to the first of January, 1854, when the said John R. coming of age, he turned over to him his share of his negroes, and continued in possession, and control, and management of the negroes, belonging to the other two minors, up to the first of January, 1855; that the said Andrew Y. Hampton, in principal and interest belonging to said minors, converted to his own use, in the purchase of property in his own name, and otherwise, between fifteen and sixteen thousand dollars, which property has been seized upon by the Sheriff of said Dougherty County, and sold under divers *fi. fas;* and that a large portion of the proceeds of said Sheriff's sale is now in the hands of said Sheriff; that said Hampton is hopelessly insolvent; and that the security of said Hampton, on his guardian's bond, will be unable to respond, if he should be made liable on the whole amount so used and appropriated by said Hampton.

The bill prays for discovery, injunction and relief. Judge Perkins sanctioned the injunction, and the defendants, Andrew Y. Hampton and John A. Phillip, Sheriff, excepted to the sanctioning, allowing and granting said injunction.

R. F. Lyon, for plaintiff in error.

Morgan, for defendant in error.

By the Court.—Benning, J. delivering the opinion.

[1.] There is equity in this bill. If the trustee converts the

trust property from the form in which it is, into some other form, the *cestui que trust* has the right to follow the property into the new form. (2 *Stor. Eq.* §1258.)

It is true, the bill is defective in some respects. It needs additional parties. It would be much the better for more distinctness and particularity in some of the allegations, especially those of the allegations that go to make out the point that the fund the complainants are in pursuit of, is a fund into which the trust property was converted. But in these respects, the bill is amendable.

The question, however, which was made the chief one before this Court, was whether this case was within the Act of 1854, "to amend an Act for the better protection and security of orphans and their estates, approved February 18th, 1799, by extending the provisions of the fifth section thereof to trustees and their estates."

The first section of that Act declares as follows: "That from and after the passage of this Act, the provisions of the fifth section of the Act above recited be, and the same are hereby extended and made applicable to the estates of all trustees in this State, who may have converted to their own use, wasted, destroyed or died chargeable to the estates of their *cestui que trust: Provided*, said trustees have had the actual possession, control and management of the property vested in them as such." (*Acts* 1853–'4, 70.)

The provisions of the fifth section of the Act referred to, are to be extended to the estates of all trustees who may have converted to their own use, wasted, destroyed or died chargeable to the estates of their *cestui que trust*. This is the first section of this Act.

The fifth section of the Act referred to is as follows: "When any guardian, executor or administrator, chargeable with the estate of any orphan or deceased person, to him, her or them committed, shall die so chargeable, his, her or their executors or administrators shall be compellable to pay, out of his, her or their estate, so much as shall appear to be due

to the estate of such orphan or deceased person, before any other debt of such testator or intestate."

This gives a remedy against the *executors or administrators* of guardians, executors and administrators, but none against the guardians, executors and administrators themselves. How, then, is it that this remedy is to be extended to "the estates of all trustees who may have converted to their own use, wasted and destroyed, or died chargeable to the estates of their *cestui que trust?*" By making the remedy reach the *executors or administrators* of all such trustees, not by making the remedy reach *such trustees themselves.* There is nothing in the Act which authorizes a suit against a person in any other capacity than that of executor or administrator. Therefore, there is nothing in the Act which could "be extended and made applicable" to a suit against a person in any other capacity than that of executor or administrator. And therefore, there is nothing in it which could "be extended and made applicable" to a suit against a guardian or against a trustee, for such a suit would be against a person in a capacity different from that of executor or administrator.

Hence, although we think that the Court did right to sanction the bill, we do not think that this Act of the Court owed its being right to this Statute of 1854, but to the principle of equity indicated in the first part of this opinion.

No. 69.—GREENLEE BUTLER, plaintiff in error, *vs.* THE MARINE & FIRE INSURANCE BANK, defendant in error.

[1.] Notes payable at a bank agency, are bankable paper, in contemplation of the Act of 1826; and before a recovery can be had of the indorser, demand and notice are necessary to be proven.

Assumpsit, &c. in Lee Superior Court. Tried before Judge WORRELL, December Adjourned Term, 1855.

The plaintiff in error was sued as indorser upon the following note:

$1.100.

On the first day of January, 1852, I promise to pay Griffiin Smith or order, eleven hundred dollars, with interest from date, at the agency of The Marine & Fire Insurance Bank at Macon, for value received. This 4th January, 1851.

JNO. S. SUDDETH

Indorsed by Smith to Butler; and by Butler to J. Olmstead, Cashier.

On the appeal, plaintiff's Counsel moved to strike out the plea of defendant, that he had never received notice of the non-payment of the note at maturity, on the ground that the note was not made payable, or intended to be negotiated, at a chartered bank. The Court struck out the plea, and this decision is assigned as error.

R. F. LYON, for plaintiff in error.

HAWKINS, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] In *Beckwith and another vs. Carlton & Co.* (14 *Ga. Rep.* 691) this Court held, that in order to charge the indorser of a note, payable at the agency of one of the chartered

banks of this State, a demand and notice were necessary. This case comes fully within that decision. And instead of favoring the banks, the very contrary is true. It is for the protection of indorsers.

Settle the rule, that the Act of 1826, requiring demand and notice on bankable paper, does not apply to notes payable at an agency, and every chartered bank in the State that has not done so already, will forthwith establish an agency to get rid of this burden.

The fact that the defendant confessed judgment on the first trial, by no means dispenses with the proof of notice on the appeal. It is an indespensable part of the plaintiff's case. Without proof of demand and notice, he is not entitled to recover.

No. 70.—HOPKINS, ALLEN & Co. plaintiffs in error, *vs.* JOHN L. SUDDETH and others, defendants in error.

[1.] Where, upon petition for *certiorari*, the Court had ordered the same to issue; and afterwards, by reason of the defendant's Counsel having removed the papers, the writ had not been prosecuted: *Held*, that it was error in the Court, on this account, to dismiss the proceeding.

Certiorari, in Lee Superior Court. Decision by Judge PERKINS, December Term, 1854.

The plaintiffs in error petitioned for a *certiorari* to certain decisions made by the Inferior Court of said County, at January Term, 1853, upon written exceptions taken at the trial. The application was made 11th July, 1853, and due notice given to the opposite party. There was attached to the petition, an exemplification of all the proceedings of the Inferior Court in the said cause.

The Judge granted the application as follows: "Read and sanctioned. Let the writ of *certiorari* issue in the penal sum of $1400, and such other proceedings be had as are usual in such cases, made and provided. Given under," &c.

These papers were filed with the Clerk of the Superior Court, on 25th July, 1853, and defendants, by their Counsel, W. A. Hawkins, acknowledged service thereon. Before the next term of the Superior Court, the papers were removed from the Clerk's office, and plaintiff's Counsel could not, after diligent search, find them; had called frequently on defendant's Attorney for them, and he denied having them, until the last term of the Court, when the receipt of Hawkins and Wallace, for these papers, was produced. The defendant's Attorney afterwards produced the papers in Court.

A motion was then made to dismiss the whole proceedings, because no *certiorari* had issued. Plaintiff's Counsel insisted that they had been guilty of no *laches*, and that the writ should issue *nunc pro tunc*. The Court dismissed the whole proceedings, and plaintiff's Counsel excepted.

R. F. LYON, for plaintiff in error.

HAWKINS, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] We are of opinion that the application for a *certiorari* in this case, should not have been dismissed, for the reason, that the Court had ordered the same to issue at a previous term, and that (as shown by the record) it was no fault of the plaintiff in error, that it had not so issued; the petition having been mislaid by the opposite Counsel, and the issuing of the writ so prevented.

We incline to think, too, that the original proceeding was not irregular; that the second original attachment was properly issued by the Justice of the Peace in Baker County. We find no positive provision of the law requiring the Clerk

to do this, though it is the practice, in some places. It is also the inclination of our minds, that it was not necessary for a bond and affidavit to be sent to Lee County. But perhaps these questions should be left open for consideration, when the *certiorari* brings them up; and we leave them free, to be discussed at that time, if it should be desired.

Let the judgment be reversed.

No. 71.—JOHN WOOLFOLK, plaintiff in error, *vs.* JAMES BEATLY, administrator, &c. defendant in error.

[1.] Long acquiescence or *laches*, by parties out of possession, is productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment, caused by the fraud or concealment of the party in possession.

[2.] The party guilty of gross *laches*, cannot screen his title to the just imputation of staleness, merely under the pretence of an imaginary impediment or technical disability.

[3.] A former administration will be presumed to protect the ancient title, and possession of personal property, as well as real estate.

Decision by Judge WORRELL, at Chambers, 20th June, 1855.

Andrew McNeely, by his last will and testament, gave and bequeathed to his wife, Esther, as follows: "four hundred and eighty dollars; and I also require my son-in-law, John Whigham, to build her a good, comfortable house on the plantation where I now reside, to be used and occupied by her during her life, or as long as she may choose; and my said son-in-law is also to furnish her, yearly, and every year during her life, with forty bushels of corn, and 100 weight of clean cotton. I do further give unto my wife,

ur beds and furniture, one large painted pine-chest and upboard, and one table and three chairs. *I do also give urther to my wife, during her residence on said plantation, small negro girl, Chloe,* and forty weight of soap, and five ushels of salt, to be furnished her, out of my estate, every ear, and four hundred weight of pork, and one barrel of lour yearly, and every year." By another item, he gave is wife a side-saddle and fire-wood, so long as she remained n the plantation. By still another item, he gave her the ea kettle and other tea furniture, and shoes, during her life. There was no residuary clause in the will. His son-in-law, ohn Whigham, and three of his friends, were appointed the xecutors of this will.

He died in 1810.

In 1855, John Woolfolk filed a bill setting forth this will, nd charging that six or seven months after the death of Andrew McNeely, Esther, his widow, removed from the plantation, with the consent of his executors, carrying with her the slave, Chloe; that John Whigham and Jonathan Archer, who, in right of their wives, were the only distributees and heirs at law of said Andrew, had full knowledge of this removal—the said Esther living still in their neighborhood; that in 1835, one William Gordon, the son of the said Esther, by her consent and direction, sold the said negro, Chloe, and her six children, to one James Walker, for a valuable consideration; and that Walker, in 1836, sold the negroes to complainant for $5.000; and that, from 1836 to 1855, complainant had remained in the peaceable and quiet possession of them, exercising ownership over them as his own; that Andrew McNeely owed no debts that remained unpaid; that in 1853, one James Beatly took out letters of administration on the estate of Andrew McNeely, and has commenced an action of trover against complainant for these negroes; that if a recovery be had, John Whigham and Jonathan Archer, or their descendants, will receive the proceeds thereof; and

that no disability has existed why they should not have taken out administration previous to this time.

The prayer was for a perpetual injunction.

Judge WORRELL refused to sanction this bill, and this decision is assigned as error.

Judge BENNING, having been of Counsel, did not preside.

S. JONES; H. HOLT, for plaintiff in error.

JOHNSON & PATTERSON, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Is the complainant entitled to the injunction prayed for, and which was refused by the Circuit Judge?

The case makes it necessary to construe the will of Andrew McNeely, deceased. For if his widow, Esther McNeely, took a life estate in Chloe, then the right of the plaintiffs' in trover, to sue, did not accrue till her death; and the bill does not show when that was. It is stated in argument to have been in 1843. If this be true, it would change, materially, the aspect of the case made by the bill.

It is insisted by the learned Counsel for the defendant in error, that Mrs. McNeely took an estate for life, both in the homestead and the negro girl. After a careful examination of the will, we are entirely satisfied that she took a life estate in neither. Some things are given to her by the will absolutely; as to others, a certain annual allowance was to be made her during her life. But as to the house which was directed to be built for her, and the occupancy of which was all the interest bequeathed to her in the land, we hold that, as to this and the girl Chloe, it is clear that the interest was contingent. It might endure for life; that is, provided she continued to live on the place where her husband died; otherwise, she might terminate it whenever she saw fit. It was in the nature of a lease or conditional estate at Common Law,

viz: the home in the house and the use of the negro, were hers so long as she might continue "tenant of the manor of Dale."

Assuming this, then, to be the true construction of the will, as we doubt not it is, what is the equity presented by the bill?

Mrs. McNeely removed from the residence designated in the will, in 1811, the year after her husband died, and settled in Burke County, some six or seven miles distant. The executors resided in the immediate neighborhood, and were knowing to the fact. One of them, Whigham, was her step-son-in-law. Archer, another son-in-law of the old man, also resided in the vicinity. Whigham and Archer were both of age at the time, and were the only heirs and distributees of Andrew McNeely, the testator, having inter-married with his two daughters. The title to Chloe, under the will, was forfeited by Mrs. McNeely's removal. And holding no longer under the will, she held adversely to the heirs at law, the will not having disposed of the remainder in Chloe. This possession continued until 1835, when Wm. Gordon, a son of Mrs. McNeely, by a former husband, sold Chloe and her children to James Walker, by and with the advice and consent of his mother. Thus asserting, as Mrs. McNeely had been doing all the time, ownership and title to Chloe and her increase. Walker sold to John Woolfolk, the complainant in the bill, in 1836, who paid $5.000 for the property, and has held the slaves, peaceably, ever since.

In 1852, forty-two years after the adverse possession in these negroes began, James Beatly, administers upon the estate of Andrew McNeely, with no debts to pay, and commences his suit at Law to recover the property, for the purpose of distribution. And this injunction is prayed for, to restrain the action. We are fully satisfied, that under the facts and circumstances of this case, as disclosed in the bill, and which we assume to be true, for the purposes of this decision, that the *ad interim* injunction should have been granted by the Judge, and that the same should be made perpetual

by a decree, upon the hearing, should the case be sustained by the proof.

[2.] Rank injustice has been frequently practiced, within our knowledge and remembrance, under young administrations taken out to recover stale demands. It is only recently that the Courts of Equity have been resorted to to put a stop to these speculative and unjust proceedings, carried on under color of law. Bonds, judgments and statutory liabilities, the highest obligations known to the law, are all presumed to be paid, after twenty years. The same presumption is made of grants, to protect titles to land. Why should not the same presumption be made of administration? This Court has applied the doctrine to real estate, with the approbation of the profession. No good reason can be assigned why it should not be applied to personalty.

[3.] Cases may occur where an injunction will be granted, even where the demand is not stale, as in the case of *Fox vs. Horah;* (1 *Iredell's Eq. R.* 358;) because it would be against conscience to allow the legal right to be enforced. Would it not be oppressive, in the extreme, to permit this recovery to be had, when there are no creditors, and the heirs have slumbered over their rights for forty years? After such a lapse of time, I would not hesitate to presume an administration, even to defeat a creditor. The peace of society demands that Courts of Equity should interpose, where there has been such gross *laches*, in prosecuting rights, or long acquiescence in the assertion of adverse rights.

In *Wagner et al. vs. Baird et al.* (7 *Howard's S. C. Rep.* 234,) the Court thus appropriately and forcibly expresses itself: "Length of time necessarily obscures all human evidence, and deprives parties of the means of ascertaining the nature of original transactions; it operates by way of presumption, in favor of the party in possession. Long acquiescence and *laches*, by parties out of possession, are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment, caused by the fraud or concealment of the party in possession,

which will appeal to the conscience of the Chancellor. *The party guilty of such laches, cannot screen his title from the just imputation of staleness, merely by the allegation of an imaginary impediment or technical disability.*"

'What is the pretence upon which this great hardship and gross injustice, in recovering this property from these *bona fide* purchasers, is sought to be justified? That no administration had been taken out upon the estate of old Andrew McNeely. Why did not the heirs at law force one forty years previously? Why this Rip-Van-Winkle sleep over their rights? Is not this, in the language of the authority, "an imaginary impediment"—a mere "technical disability?" No bad faith, concealment or fraud, is imputed to Mrs. McNeely or those claiming under her. There was no greater obstacle to the procurement of an administration and the prosecution of their claim, at any time within the previous forty years, than there was now. If a disability existed, it was voluntary and self-imposed. Mr. Whigham, one of the only two heirs at law, was an executor—why did he not administer, in order to recover this property, which was outside the will, in 1811? For then the adverse holding commenced. And it was open, visible, notorious and immediately under his eye. There is nothing to mitigate this inexcusable delay. It is troublesome enough to get at the truth of matters transpiring daily around us. We protest against this uncovering the graves of the dead, and groping after the truth of facts involved in the mist and obscurity consequent upon the lapse of nearly half a century. Under such circumstances, we should regard more the antiquity of possession by the defendant, than the novel accruer of title to the plaintiff.

No. 72.—JAMES WOOD AND JAMES MORRIS, plaintiffs in error, *vs.* SHADRICK T. CRAWFORD, defendant in error.

[1.] Courts of Ordinary, in Georgia, are not Courts of limited jurisdiction, as to testate and intestate estates, in the sense of the rule, that all that is necessary to show jurisdiction, must appear on the face of the record on the proceedings of that Court; and as regards such estates, every presumption is to be made in favor of their jurisdiction.

Ejectment, in Sumter Superior Court. Tried before Judge PERKINS, February Term, 1855.

Plaintiffs in error brought suit in ejectment against the defendant, for lot land No. 23, in 28th district of Sumter County. On the trial, they offered in evidence a grant from the State to "Cynthia A. Ashworth, illegitimate of Boswell's district, Franklin County." Then the following order, passed by the Court of Ordinary of Franklin County, 1st September, 1834: "ordered, that Joshua Wood, guardian, have leave to sell lot No. 23, in the 28th district of originally Lee County, for the benefit of Cynthia Ashworth." Defendant's Counsel objected to the order, because it did not appear, on its face, that Cynthia Ashworth, or any of her property, was in Franklin County, at the time of the granting of the order. The Court sustained the objection, and plaintiffs excepted.

The Court also ruled out the deed made by the guardian to plaintiff, Wood, as the purchaser at the sale, and plaintiff excepted.

Plaintiffs below offered to prove, by witnesses, that Cynthia Ashworth did reside in Franklin County, at the time of the granting of the order. The Court rejected the evidence, and plaintiffs excepted.

On these exceptions, error has been asssigned.

BROWN & BROWN, for plaintiff in error.

DUDLEY, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] This case is covered by the decisions in *Tucker vs. Harris*, (13 *Ga. Rep.* 1,) and *Perkins and others against Attaway*, (14 *Ga. Rep.* 27,) and conceded to be, by Counsel for defendant in error, who, in consequence thereof, declined submitting an argument.

No. 73.—JOHN BUCHANAN, plaintiff in error, *vs.* SOLOMON G. BECKHAM, defendant in error.

[1.] The State should be a party to all motions to establish lost papers belonging to a State case.

Motion to establish lost papers, in Early Superior Court. Decision by Judge PERKINS, April Term, 1855.

This was a motion in the Court below, to establish as lost office papers, an affidavit and warrant, to apprehend a slave for an alleged offence, together with the proceedings thereon, including a petition for and a writ of *habeas corpus*, sued out and decided at Chambers. The Court below refused the motion, and this decision is assigned as error.

CULLENS; ALLEN, for plaintiff in error.

COOK; MCDOUGALD; HALL, for defendant.

By the Court.—BENNING, J. delivering the opinion.

[1.] It does not appear what was the ground on which the Court below acted, in refusing the motion.

There is a ground in the case, which was sufficient to justify the refusal; and that, we are to presume, is the ground on which the Court acted. The party defendant to the motion, is not the proper party. The *State* should have been the defendant to the motion. The papers to be established, were all papers representing proceedings between the State and a slave; and if we admit that the owner of the slave may be the proper party for one side of the motion to establish such papers, we must admit it to be more clear, that the State is the proper party for the other side. But instead of the State's being made the defendant to the motion in this case, the prosecutor was made the defendant. As well might a witness, or the Sheriff, or jailor, or, indeed, any stranger, have been made the defendant.

In such cases as this, the State, through its Solicitor General, ought to be heard.

It is a question of doubt, too, whether these are papers which can be established in the way in which the attempt was made to establish them. Are they *office* papers; such office papers as the rule of Court has in contemplation?

We think the judgment of the Court below ought to be affirmed.

No. 74.—WILLIAM NORWOOD, plaintiff in error, *vs.* JAMES DICKEY, defendant in error.

[1.] A Court of Equity has power to restrain a person from increasing the height of his mill-dam, if increasing the height of it would be productive of loss of health in the family of another person residing in the neighborhood of the mill.

In Equity, in Calhoun Superior Court. Decision by Judge PERKINS, at May Term, 1855.

Norwood vs. Dickey.

William Norwood filed a bill against James Dickey, alleging that complainant was the owner of certain lots of land, and that Dickey was the owner of adjoining lots; that Dickey had erected a mill-dam upon his land, by which a large pond of water was made stagnant, and a large swamp saturated; and that, by reason of the decaying timber and the miasma arising therefrom, the family of complainant had been made very sick the next summer after the erection of the dam; that the damage to complainant was irreparable, in money; and that the continuance of the dam was certain sickness to complainant's family, *forty in number*. The prayer was for an injunction, restraining defendant from raising the dam higher, as he threatened to do; and for a decree to abate the nuisance.

Defendant demurred, on the ground that the Court had no jurisdiction over the subject-matter, there being an adequate remedy at Law. The Court sustained the demurrer, and this decision is assigned as error.

WARREN & WARREN, for plaintiff in error.

McDOUGALD; CARUTHERS, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] Did the Court below have power to entertain this bill? The bill has two objects in view: one to demolish the dam, the other, to prevent the dam from being raised higher. It appears, by an amendment to the bill, that the defendant was engaged in raising the dam higher.

The defendant demurred to the bill, on the ground, that the complainant had an adequate remedy at Law. The Court sustained the demurrer, and dismissed the bill. If there was any equity at all in the bill—any equity for either of the two objects it had in view, this judgment was erroneous.

The remedy at Law, which the Court below thought an ad-

equate one was, it is probable, the remedy which is given by the twenty-fourth section of the tenth division of the Penal Code. If the remedy provided by that section of the Code *is* adequate, the Court below was right in dismissing the bill. For if, at Law, there is a remedy which is entirely adequate, whether that remedy is supplied by a Statute or by the Common Law, makes no difference. In either case, a Court of Equity has no jurisdiction. (*McGough & Crews vs. The Insurance Bank of Columbus*, 2 *Kelly*, 151.)

Is, then, the remedy given by that section of the Penal Code, an adequate one in this case? The section declares, among other things, that "any nuisance which tends to the immediate annoyance of the citizens in general, is manifestly injurious to the public health and safety," &c. "may be abated and suppressed by the order of any two or more Justices of the Peace of the county, founded upon the verdict and opinion of twelve freeholders of the same county, who shall be summoned, sworn and empannelled for that purpose," &c.; "Provided, always, that when the nuisance complained of is a grist-mill or saw-mill, or other water machinery of valuable consideration, the same shall not be destroyed or abated, except upon the affidavits of two or more freeholders, before one or more of the Justices of the Inferior Court of the county," &c. "testifying that the health of the neighborhood, according to their belief and opinion, is materially injured by such mill-dam, or other obstruction," &c.; "whereupon, it shall be the duty of such Inferior Court, as soon as practicable, to cause a Jury of twelve men to be drawn from the Jury-box, and summoned for the trial of the cause, who, together with the said Court, shall attend at the court house of said county, to adjudge the case of nuisance complained of; and both parties shall have a reasonable time allowed them to summon their witnesses, and procure their attendance." (*Prince's Dig.* 648.)

A majority of the Court feel quite confident, that in this part of the Code *is* provided an adequate remedy for as much of the case as relates to the injury caused by the dam, as that

stood before the defendant began to raise it higher. And to this opinion of the majority of the Court, I yield quite a doubt of my own. My doubt consists in this: was it the intention, in this part of the Code, to furnish a *private* remedy? The wrong to be remedied, is one "to the citizens in general," or "to the public health and safety;" or one that "tends greatly to corrupt the manners and morals of the people." And this is a *public* wrong, is it not? Could any single private man control a proceeding under this law—say dismiss the proceeding, forgive the injury, or accept for it compensation of any sort? I doubt it.

We are all equally confident, however, that the Court below had power to prevent the defendant from raising his dam any *higher*. A person in the situation of this complainant, is not bound to stand by, passively, and see a dam of this sort built, even if, after its completion, he may, at Law, have a means of its demolition. (*Coker vs. Birge*, 9 *Ga. Rep.* 425.) And therefore, he is not bound to stand by and see such a dam, when built, raised higher.

May he not prevent it from being raised higher, (will it be asked) by resorting to the remedy given by this section of the Penal Code? It is not certain that he may, I answer; for, first, there is no telling, beforehand, what length of time it will take for this remedy to be worked out; and therefore, there can be no certainty that the business of raising the dam will not have been completed long before the time has come for this prostration of the dam, by the remedy, to take place. And secondly, it is not certain that he can even resort to that remedy for such a purpose, viz: the purpose of preventing the dam from being raised higher; for before he can resort to that remedy at all, he must get the affidavits "of two or more freeholders," "testifying that the health of the neighborhood, according to their opinion and belief, is materially injured" by the mill-dam. These he may not be able to get; and he may, nevertheless, be entitled to prevent the dam from being raised higher. It is plain, that a case may exist in which a person will have the right to prevent a dam from

being made higher, although it may be that he will have no right to have the dam prostrated.

And, indeed, if he could get the affidavits, that would not be getting the verdict of the Jury. The Jury might think that the dam ought not to be made higher; and yet, think, too, that it ought not to be prostrated—might think, in short, that the dam ought not to be touched at all, either by the owner, to raise it higher, or by the neighbors, to destroy it altogether.

To abate or destroy a mill-dam, already erected, is considered, by this section, to be a grave affair: whereas, to prevent the erection or enlargement of a dam, by an order, which must, at first, be a temporary one, ("until further order,") and which will never become a permanent one if, on inquiry, it is found that it ought never to become a permanent one, is something which the section sees fit not to notice, and something which the rest of the law, i. e. which Equity regards as no great matter.

The remedy, then, furnished by this section, is one of which it cannot, with certainty, be said that it is adequate to prevent a dam from being raised higher. To prevent that from being done, is one of the objects of this bill.

We think, therefore, that to the extent of this object, there was equity in the bill; and therefore, that the bill should not have been dismissed.

No. 75.—RANDAL JORDAN, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant.

[1.] The demand authorized under the XVIIIth section of the 14th division of the Penal Code, may be made at any time during the term, provided there be a Jury empannelled and qualified to try the cause; it must be made, to be available, before the Jury is discharged.

[2.] Doubts expressed, as to the soundness of the construction put upon this section, in *Denny vs. The State*, (6 *Ga. Rep.* 491.)

Motion, in Dougherty Superior Court. Decided by Judge PERKINS, June Term, 1855.

Jordan was indicted for voluntary manslaughter. At May Term, 1855, after the Juries were discharged, (the case not having been called in its order, because it was not reached,) he moved to place upon the minutes a demand for trial. The Court refused the motion, and this decision is assigned as error.

WARREN & WARREN, for plaintiff in error.

Sol. Gen. LYON; MORGAN for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] By the XVIIIth sect. of the 14th division of the Penal Code, is enacted, that "any person against whom a true bill of indictment is found, for an offence not affecting his or her life, may demand a trial at the term when the indictment is found, or at the next succeeding term thereafter; which demand shall be placed upon the minutes of the Court; and if such person shall not be tried at the term when the demand is made, or at the next succeeding term thereafter: *Provided*, that at both terms, there were Juries empannelled and qualified to try such prisoner, then he or they shall be absolutely discharged and acquitted of the offence charged in the indictment." (*Cobb's Digest*, 836.)

Now, the only question in this case is, whether the demand must be made before the Jury is discharged for the term?

We have never known any other construction put upon this Act, than the one given to it by Judge PERKINS, namely: that the demand should be made while there is a Jury in attendance upon the Court. And while we adhere to this

uniform and contemporaneous construction of the statute, we hold that it is the priviliege of the prisoner to make his demand at any time during the Court, before the Jury is discharged; at the same time, suggesting that it is a most appropriate period to do this, when the Court is about to discharge the Jury for the term. But the earlier the demand is made, the better; for it enables the Court to give such directions to the business of the term, as will secure a trial to those who are urging it.

We could assign strong reasons in support of the practice which has grown up under the Statute, but we forbear to do so.

[2.] In *Denny vs. The State*, (6 *Ga. Rep.* 491,) this Court held, that the defendant, under this Statute, was entitled to make his demand, not only at the term when the indictment was found, or at the next succeeding term thereafter, *but at any subsequent term of the Court.* The reasoning, in support of that interpretation of the Act, is plausible; but subsequent reflection has induced me to doubt whether it was a sound construction of the Code, either upon principle or policy.

No. 76.—JOHN M. BURTINE, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

[1.] Though a witness be examined irregularly by the Solicitor General; yet, if no objection be made at the time, but the opposite party permit the examination to proceed, it may be presumed that the irregularity was waived; and if no interposition, on the part of the Court, is invoked, and no opinion on the point expressed by the Court, there has been no decision, sentence, judgment or decree for the revision or determination of this Court.

[2.] It is not only the right, but the duty of the Judge, to revise and correct the brief of testimony, in all cases where it is required to be filed.

[3.] Although it is loose, and highly irregular and improper, for any portion

of a Jury, after being sworn in a cause, to enter a retail grocery, and there to converse with various persons; yet, where it appears that they were accompanied by the Bailiff; that he heard all that was said; that they did not converse about the case; and especially, where it is shown that the prisoner, himself, was present, and no injury resulted to him from the conduct of the Jury, the Court will not interfere with the verdict.

Murder, in Lee Superior Court. Tried before Judge WORRELL, March Term, 1855.

When the prisoner was arraigned and put upon trial, he moved a continuance, on the ground that the evidence taken down before the committing Magistrate, was not in Court. The motion was refused, and prisoner excepted.

Thomas Marsh, a Juror, said he had been absent from the country from July to December, but his father lived in Lee County, and he considered that his home; that he considered himself at home wherever he was. The Court held him competent, and defendant excepted.

After the prisoner's challenges were exhausted, Elijah Tucker, being put on triors, stated that he had formed and expressed a decided opinion as to the guilt of prisoner. To questions put by the State's Counsel, he said that his opinion of the guilt of the prisoner was not so fixed but that it could be removed by the evidence; and that he thought he would be controlled by the evidence rather than by his preconceived opinions. The Court held him competent, and defendant excepted.

After one of the witnesses had testified, the Solicitor General moved that his testimony, as taken down, be read over to him. The Court refused the motion, and defendant excepted.

Subsequently, on a motion for a new trial being made, the Court ordered the testimony of this witness to be corrected according to the recollection of the Court. To this proceeding defendant excepted.

The deceased (Spence) stated to a witness, after he was wounded, that Burtine beat and about ruined him. He spoke

like a drunken man; told them to go away and let him alone. To this being admitted in evidence, defendant objected; and being over-ruled, excepted.

Counsel for defendant requested the Court to charge, "that if they believed the deceased, at the time the injuries were inflicted on him, was in such a situation as would have rendered him an incompetent witness, if on the stand, then his declarations, made *in extremis*, were not entitled to credit. And farther, that though the competency of the dying declarations was decided by the Court, their credibility was to be judged of by the Jury." The Court declined so to charge, but certified that he had previously told the Jury they were to judge of the credibility of these declarations. Defendant excepted.

A motion was made for a new trial, on all the preceding points; and also on the ground, that when three of the Jurors had been selected, one of them, John Ross, separated himself from the others and from the Bailiff, went into a grocery and drank liquor, and conversed and danced with the bystanders; that another Juror, Caleb Parker, also conversed with persons, not of the Jury, after he was sworn.

This ground was supported by sundry affidavits. The Jurors filed affidavits to the effect, that they had not conversed with any one in relation to the case; and the bailiff of the Jury swore, that he was with these Jurors; heard all that they said; that they did not converse in relation to the case and that the prisoner was present and in hearing of what they said.

The Court refused a new trial, and defendant excepted.

Upon these several exceptions, error was assigned.

R. F. Lyon; M. Williams; H. Moore, for plaintiff in error.

Sol. Gen. Lyon, for the State.

By the Court.—Starnes, J. delivering the opinion.

[redacted]t a few of the several grounds of objection which appear

in the bill of exceptions in this case, were presented for our consideration at the hearing, by the Counsel for the plaintiff in error. These, only, we shall notice in the opinion; finding, as we do, no cause for interference with the judgment, on any of the other points.

[1.] One of the Jurors, Elisha Tucker by name, was put upon triors; and before the triors he was examined, the Counsel for the State being permitted, without objection, to examine the Juror, with reference to his opinion as to the guilt of the prisoner. To the questions put by the Counsel, he gave such answers as, without doubt, led to his being found competent by the triors.

It is now insisted, that the State's Counsel had no right to put these questions to the Juror.

It is unnecessary for us to decide, whether or not it was proper for the Solicitor General thus to examine the Juror. It was permitted, without objection or cavil. And we have repeatedly ruled, that objections on account of such matters of practice, must be made at the trial, and the decision of the Court had thereon; otherwise, we are not authorized to interfere on account of error in the proceeding.

Irregularities of practice ensue in, perhaps, every trial of importance; they ensue frequently with the concurrence of both parties, and are rightly supposed to be waived when no objection is made on account thereof.

Besides, if no exception be taken at the trial, no point made, and the opinion of the Court not invoked and not given, there has been no decision, sentence judgment or decree of a Superior Court rendered upon the point; and therefore, by the organic law of this Court, we have no right to review the proceeding.

[2.] We recognize the right of the Judge, in the Court below, to revise and correct the brief of the testimony, as it is presented to him in the record. It is his duty to see that a correct and proper statement of the evidence is presented;

and he violates his duty in a most important and vital particular, if he fail to do this.

The Court below was, therefore, right in ordering such of the testimony, as (according to his recollection) had been omitted to be inserted, and in revising and correcting the other testimony presented. It is true that the Judge may err in the discharge of this duty, and that his error cannot be corrected. But from the necessity of the case, this power of revision and correction must be reposed somewhere; and where can it be more appropriately confided, than in that officer who has been chosen by his fellow-citizens to sit in judgment, uprightly and disinterestedly, between his fellow-citizens who are litigant before him?

[3.] With the only other exception remaining to be considered, we have had some difficulty in dealing.

The affidavits presented upon the motion for a new trial, show, very clearly, that two of the Jurors, Ross and Parker, improperly behaved themselves after they were sworn—entering a grocery or retail shop as they did, and one of them (John Ross) speaking with several persons, and otherwise demeaning himself in a manner unworthy of a sworn Juror, and especially of one who was charged with an issue of life or death. And we should feel it our duty to send the case back on account of this conduct, but for the statement of the Bailiff who attended the Jury.

The Jurors, themselves, in their exculpatory affidavits, say that they were not out of the presence of the Bailiff. Parker declares that he held conversation with no one in relation to the case, and Ross makes a similar statement. The Bailiff swears, that he remained in company with these Jurors when they went into the grocery; that he heard what was said to the various persons with whom conversation was held by them; that nothing was said in relation to the case, and that the prisoner was present and in hearing during all this time.

This latter fact, when taken in connection with the other statements of the Bailiff, has satisfied our minds that no in-

jury came to the prisoner by the loose conversations of these Jurors; and on this account, we will not control the verdict.

Judgment affirmed.

No. 77.—SEABORN JONES, plaintiff in error, *vs.* THE WATER LOT COMPANY OF COLUMBUS, defendants in error.

[2.] In trespass, if the jury find for the *defendant*, when it is conceded that the plaintiff is entitled to recover nominal damages, another trial cannot be avoided by tendering to the plaintiff one dollar and costs.

[1.] Every riparian proprietor, above the ebb and flow of tide water, is entitled to the land covered by the water to the middle thread of the river; on the Chattahoochee, this extends to the boundary of the State on the Western bank.

[3.] In an action of trespass, the defendant may claim the *locus in quo* to be his soil and freehold, or the soil and freehold of a third person, by whose authority he entered.

Trespass, in Muscogee Superior Court. Tried before Judge WORRELL, at December Term, 1855.

Seaborn Jones brought suit against the Water Lot Company of the City of Columbus, for a trespass, in overflowing the water wheels of plaintiff's mill, by erecting and raising a dam below, and causing the water to flow back. Plaintiff claimed under a grant from the State of Georgia, and proved on the the trial the trespass laid. It was also proved that plaintiff's own mill-dam, extended across the river; and without extending across, the mill would be worthless.

The Court charged the Jury, that if they believed that the plaintiff's dam did not extend across the river, his mill was valueless, and he could not recover for overflowing his wheels; and, if they believed it did extend across the river, then it

was erected on land not conveyed by the State to him, and he had no right to recover, except nominal damages for overflowing his land.

The Court declined to charge the following requests:

1. That if plaintiff erected his dam on the land belonging to the State, he was accountable only to the State, and that it did not justify defendant's trespass.

2. That the plaintiff could recover for a trespass to property in his possession.

3. That the charter of the defendants did not authorize the erecting of a dam and the trespass on plaintiff.

The charge given, and the refusals to charge, are the errors assigned in this Court.

A motion was made for a new trial, on the ground that the verdict was contrary to the charge of the Court, in this: that the Court charged that they should give the plaintiff nominal damages, when the Jury found for defendants. The Court ordered a new trial, unless defendant would pay the plaintiff nominal damages and the cost; whereupon, defendants tendered the plaintiff one dollar for damages, and seven dollars and fifty cents costs, which he declined to receive.—The Court refused a new trial, and this is also assigned as error.

S. JONES, for plaintiff in error,

J. JOHNSON, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The plaintiff is manifestly entitled to a new trial in this case. It was not disputed but that he was entitled to recover nominal damages, at least, for the overflowing of his land by the erection of the defendant's dam; and so the Court charged the Jury. A verdict was, notwithstanding, rendered for the defendant; whereupon, the presiding Judge put the defendants upon terms, namely: that if they would

pay nominal damages and cost, a new trial would not be granted. One dollar as damages, and seven dollars and fifty cents costs, being tendered in open Court and refused, a new trial was refused.

The Court had no right to impose such terms. It is not unusual, where a verdict has been recovered for too much, to require the *plaintiff* to remit the excess to avoid another trial; but we know of no practice to justify the case before us. Indeed, it is obviously against principle. What right has the Court to determine what the nominal damages shall be? Whether one dollar or five dollars?

But, waiving this view, there is another objection to this proceeding, which is insuperable. The plaintiff was entitled to a verdict, because it established his right; and the Court had no power to deprive him of this advantage; one which would serve to answer many valuable purposes.

[2.] But we go further: In our judgment, the law of the case, generally, was misapprehended. In *Young vs. Calhoun & Harrison*, (6 *Ga. Rep.* 130, 141,) this Court held, that grants of land, bounded on rivers above tide-water, or where the tide does not ebb and flow, carry the grantee to the middle of the river. And that in grants bounded by the Chattahoochee, this riparian right extended to the opposite bank; that, and not the river itself, being the western boundary of Georgia.

And we see nothing to change or modify that opinion. True, the plaintiff's fraction, No. 1, is bounded by the Chattahoochee River; but by construction of law, it reaches to the opposite shore, unless there are expressions in the terms of the grant, taken in connection with the situation and condition of the land granted, which clearly indicate the intention of the State to stop at the eastern edge or margin of the river. We see in the grant to Col. Jones, the plaintiff, no reservation or restriction, express or necessarily implied, which controls the operation of the general presumption in favor of riparian proprietors, and which makes his particular grant an exception to the general rule.

And whether the majority of the Court were right, in *Howard vs. Ingerrold*, (13 *Howard's Rep.* 381,) in holding that the true boundary between Georgia and Alabama, was the top of the high western bank of the Chattahoochee River, where vegetation begins to grow, and leaving the bed of the river and western shelving shore within the limits and jurisdiction of Georgia; or Mr. Justice *Nelson* and the minority, held the better opinion, in making the ordinary water-mark the true western boundary of this State, Col. Jones was equally entitled to construct his dam across the river.

But suppose Col. Jones, as a riparian grantee, was restricted to the thread or middle of the stream; still, was he not entitled to maintain trespass against the defendants? They rely upon a charter from the State, and a conveyance from the City Council, made in pursuance thereof. The Act of Incorporation of 1845 has been read, but the deed or deeds made to the Water Lot Company, by the City Council, have not been produced. We are judicially ignorant, therefore, of their contents. According to the Act of 1845, the dam of the Water Lot Company was to be built in pursuance of the contract made with the Council. Suppose it should turn out to be true, as represented by Col. Jones to be the case, that these conveyances only authorize a dam to be constructed five feet high, which would not interfere with plaintiff's mill, and they have erected one between seven and ten feet, according to the proof in the record, and by reason of said excess the plaintiff's water-wheel is overflown, is it not apparent that the charter from the State and the deeds from the Council, would constitute no justification for the damage done to plaintiff's property?

[3.] The defendant in trespass may plead *liberam tenementum*, not only in himself, and thereby prevent a recovery, but likewise in another, with whom he is in privity. And some of the authorities go so far as to say, that the defendant may make this plea available to himself, by procuring the authority of him who owns the freehold, to plead in bar of the plaintiff's possessory right. (2 *Salk.* 453. 7 *T. R.* 355. 1

Saund. 299—*b*, *note.*) But no such authority has been delegated by the State to these defendants. At any rate, none such has been produced.

In any view of this case, then, the judgment of the Court below was erroneous, and a new trial must be granted.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

AT DECATUR,

AUGUST TERM, 1855.

Present—JOSEPH H. LUMPKIN, EBENEZER STARNES, HENRY L. BENNING. } *Judges.*

No. 78.—SARAH A. L. GRISWOLD AND LYMAN GRISWOLD, plaintiffs in error, *vs.* THOMAS R. GREER *et al.* defendants in error.

[1.] A bequest of property by a testator to his wife, S L G, for life; and if his daughter M *should be dead at the death of her mother, S L G, without issue, or afterwards die, leaving no issue, then to the children of T and J M and J G*, gives to M a *contingent* and not a *vested* interest; and at any period before the death of the mother, leaving M without issue, the children of T and J M and J G, may maintain a bill against S L G, praying a stay of waste, &c.

[2.] The words, *should she afterwards die, leaving no issue*, must, in this State, be construed to import a failure of issue *at the death*, and not *an indefinite failure of issue.*

In Equity, in Coweta Superior Court. Demurrer. Decided by Judge BULL, September Term, 1854.

This bill was filed by Thomas R. and John Greer, and Thomas R. as the next friend of Sarah A. Greer, heirs of William D. Greer, deceased, against the plaintiffs in error. The bill alleges that Gilbert D. Greer died, having first made his last will and testament, in which were the following items:

"*Item* 1st. After my decease, it is my desire that my body be decently buried; that my funeral charges and just debts shall be paid by my executor hereinafter named.

Item 2d. It is my wish that my daughter, Mary W. Hill, shall, immediately upon my decease, take into her possession and in judgment to her and her heirs, absolutely, the five following named negroes, &c.

Item 3d. It is my will and desire, that my wife, Sarah A. L. Greer, shall have, absolutely, to her and her heirs, and independently of any bequest or devise hereinafter made, the following named negroes, &c.

Item 4th. I furthermore bequeath and devise to my said wife, for and during her natural life, the whole of the residue of my estate, both real and personal, not hereinafter disposed of, comprising the remainder of my negroes, my homestead and all other lands, plantation utensils, stock, wagons, carts, family carriage, provisions, household and kitchen furniture—to remain and be kept together, used and enjoyed by my said wife, in the same way as though I were living. And at the death of my said wife, it is my will and desire that the whole of the above mentioned residue of my estate result to and vest, absolutely, in fee simple, in my daughter, Mary W. Hill, if then living, and her issue, if any; but if my said daughter should, at that time, be dead without issue, or afterwards die, leaving no issue, then and in either of said events, it is my desire and will that the said residue of my estate, as above mentioned, at that time remaining, be equally divided

among the lawful children of Thomas and Jane Mangham, deceased; the lawful children of James A. Greer, deceased; the lawful children of Wm. D. Greer, deceased, and the lawful children of Nathaniel H. Greer, who is now living.

Item 5th. I furthermore give and bequeath my beloved wife, Sarah A. L. Greer, after the payment of all my just debts aforesaid, to be used and enjoyed by her as she pleases, without accountability, all my crop of cotton on hand, cash on hand, notes, bonds, accounts, money demands of every description, that may be and are owing to me at the time of my death."

A. B. Calhoun was named as the executor, who refused to qualify, and administration, with the will annexed, devolved upon Hillsberry R. Harrison, the Clerk of the Superior Court of Coweta County.

The bill alleges that Mrs. Greer took possession of the cotton, notes, accounts, &c. as well as all the property bequeathed to her in the 4th item of said will; that the aggregate value of the personal property was $18.000, exclusive of the ready money, notes, accounts, &c.; that the value of the crop of cotton (sixty-five bales) on hand at the time of testator's death, was $2.500; and that Mrs. Greer sold it for that or some other large sum; that the grain on hand, over and above the necessary quantity for use, was worth $500 00. The bill charges that by the 1st and 5th items of said will, the proceeds of the cotton and grain should have been applied to the payment of the debts of testator, but that Mrs. Greer had appropriated the same to her own use, while the administrator had been compelled to sell four of the negroes included in the residue of the estate, mentioned in the 4th item of the will, to pay off debts against the estate—Mrs. Greer becoming the purchaser of one of said negroes at the price of $1000. The bill charges that Mrs. Greer had exchanged or swapped off one of the negroes included in the 4th item of the will, worth $10.00, for another negro, of what value complainants cannot say.

The bill states that since these transactions, Mrs. Greer has intermarried with one Lyman Griswold, and that they are in the joint possession of the property. The bill charges that the said Lyman is a stranger in the community; that rumors affecting his character for integrity are in circulation, and that his object in marrying Mrs. Greer was to get possession of the property, and that complainants believe and apprehend that he will remove the property beyond the jurisdiction of the State.

The bill further states, that Mrs. Mary W. Hill has been married for a long space of time, and that she is barren; has had no issue, and complainants believe never will have any children. Complainants state that they are the children of William D. Greer, mentioned in the 4th item of said will.

The bill prays for a writ of injunction to restrain the defendants from wasting and disposing of said property—a writ of *quia timet*, to restrain them from removing the property—to which is added a general prayer for relief.

To this bill, the defendants filed a general demurrer.

The Court over-ruled, and defendants excepted.

SIMMS & HAMMOND, for plaintiffs in error.

WRIGHT & BUCHANAN, for defendants in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] The defendants in error are entitled to the relief which they seek, although, in the use of the words which he has employed, the testator may have looked to an indefinite failure of issue in the line of his daughter, Mary. W. Hill.

The words material to be considered, in the fourth clause of the will are, "if my said daughter should at that time be dead" (the period of his wife's death, to whom he had given a life estate in the property,) "without issue, or afterwards die leaving no issue, then, and in either of said events, it is my desire and will that the said residue of my estate, at that

time remaining, be equally divided among the lawful children of Thomas and Jane Mangham, deceased, the lawful children of Jane Greer, deceased," &c.

It will be perceived, that according to these terms, the testator did not intend that any estate in this property should vest in his daughter, if she died before her mother, without issue. This will be admitted, whatever construction may be put upon the other words, "or afterwards die leaving no issue."

Now, let it be admitted, that in the use of these latter words, he looked to an indefinite failure of issue, (as is insisted,) and that so far as this feature of the will is concerned, the effect of these words being to create an estate tail, or perpetuity, an absolute fee simple estate in the property is vested in the daughter, should she survive her mother. Yet, it is apparent that no estate can unconditionally vest in her before her mother's death, for the provision is, that if she should die before her mother, without issue, the property is then to pass to the defendants in error. The record shows that the mother is still living, and that the daughter has no children. If she should thus die before her mother dies, of course the clear and definite provision in favor of these defendants in error, dependent upon this event alone, will take effect. It follows, therefore, that the interest of the daughter, Mrs. Hill, or of her estate in this property, is in the nature of a contingent remainder—a remainder resting upon the condition of her surviving her mother with issue.

A contingent remainder is one which is limited to take effect on an event or condition which may never happen or be performed, or which may not happen or be performed until after the determination of the preceding particular estate. Here, as we have said, the interest of Mrs. Hill is limited on an event which may never happen, viz: the death of her mother before herself—she having issue.

These considerations make it quite clear that the interest of Mrs. Hill in this property is not a *vested* interest, and that in one point of view, these defendants in error have

such an interest over, as cannot be affected by the terms which may be supposed to contemplate an indefinite failure of issue in the line of Mrs. Hill.

If she survive her mother, and a question arises between her, or those claiming under her, and these defendants in error, as to the degree of interest taken by her, this will be determined by the other question, whether or not, in the use of these words, the testator contemplated an indefinite failure of issue. But if she should not survive her mother, and leave no issue, such question cannot arise; and the interest over, of these defendants, will be undisturbed by any such inquiry. As a consequence, the defendants in error have a clear and settled right to come before the Chancellor and pray, that waste of this estate (which, if one event happen, will certainly be theirs) shall be stayed.

[2.] The view of the case which we have presented, has proceeded upon the admission, that the words used by the testator did contemplate an indefinite failure of issue in his daughter, and would, in consequence, vest in her an estate in fee simple, if she should survive her mother. But it is not, in fact, our opinion that such is the effect of these words.

The language is: "But if my said daughter should, at that time, be dead without issue, or afterwards die, leaving no issue, then," &c.

The construction of such words as these, viz: "or afterwards die, leaving no issue," in the Courts of England, for a great length of time, has been, that as to real property, they import *an indefinite failure of issue;* but in conveyances of personal estate, it has been held that the word *leaving* modifies the other expressions, so that they mean only a dying without issue, *at the death* of the first taker.

The natural and legitimate signification of such words, imports a failure of issue *at the death*, and not at any indefinite time thereafter; and we believe and we think we have shown, in the case of *Harris, administrator, vs. Smith, administrator*, (16 *Ga. Rep.* 545,) that the conventional or artificial construction which the Courts of England have adopted,

and which has been followed frequently in this country, is not made necessary by the Statute, commonly called the Statute *De Donis, &c.;* which Statute is referred to by our Act of 1821, as the exponent of such terms as serve to create an estate tail. We believe that the reasons for this construction found their origin in feudal influences, and the interests of the heir at law in England; that such reasons do not exist in our State, where there is, technically, no heir at law, and where estates tail are prohibited; and that the reasons failing, the rule of construction founded upon them by the Courts, should cease.

But for our opinion on this subject, in full, see the case of *Harris vs. Smith,* above cited.

Judgment affirmed.

No. 79.—WILLIAM METHVIN, plaintiff in error, *vs.* JAS. BEXLY *et al.* defendants in error.

[1.] A lot of land was sold under *fi. fas.* as the property of the defendant in the *fi. fas.* The purchaser paid the Sheriff the purchase-money and went into possession. Afterwards, the title failed and he had to give up possession. He then, in Equity, sued the Sheriff and the defendant in the *fi. fas.* and the plaintiff in the *fi. fas.* for a balance of the money remaining in the Sheriff's hands, after the payment of the *fi. fas.* and which balance the plaintiff in the *fi. fas.* was claiming by virtue of other *fi. fas.* which he had obtained against the same defendant. On demurrer to the bill, the Court dismissed it: *Held,* that the Court did right, but leave given to amend.

In Equity, in Coweta Superior Court. Demurrer. Decided by Judge WARNER, September Term, 1854.

William Methvin filed his bill in Coweta Superior Court against James Bexly, Sheriff of said county—Spencer Riley and Alpha Martin alleging that in April, 1850, the said

Bexly, as Sheriff of said county, sold lot of land, No. 222, in the 1st dist. of Coweta County, under two *fi. fas.* issued in favor of Riley, against the said Martin, from a Justice's Court in Bibb County, one for $21 07 principal, and the other for $20 19 principal, for the sum of $145 50, which sum, after paying off the *fi. fas.* left in the hands of the said Bexly Ninety-one Dollars, which has never been claimed by any person. The bill alleges that complainant was the purchaser of the land at said sale, and paid the purchase-money to the Sheriff; that an action of ejectment was brought to the March Term, 1851, of the Superior Court of said County of Coweta, by Jas. F. Slatter and Thomas Napier, against Edmond Adcock, tenant in possession, for the recovery of said lot of land—the said Adcock being the tenant of complainant. The bill further alleges, that the plaintiff in said ejectment cause, held a perfect chain of title to the said land, and that Alpha Mather never did have any title to the same; that the said action of ejectment has been settled by the parties, and the land given up by complainant, upon the ground that the said plaintiffs held the legal title to the same; that pending the said action of ejectment, complainant inquired of Riley as to the residence of Martin, but never could obtain any satisfactory information from Riley.

The bill further charges, that at the September Term, 1852, of said Court, complainant instituted a rule against the Sheriff for the balance of the purchase-money in his hands, which is now pending; that Riley subsequently obtained more executions against Martin, and upon them claims the balance of the purchase-money; that the Sheriff refuses to pay over the money to complainant under the rule, alleging that he has the said *fi. fas.* in his hands, claiming the money.

Complainant further states, that he has no means of knowing where the said Martin lives, but expressly charges that if there be such a person, he lives out of the jurisdiction of the Court, or has gone to parts unknown.

The bill prayed that the Sheriff, Bexly, be enjoined from

paying the said ninety-one dollars to Riley, and that he be decreed to pay over the same to complainant.

To this bill, a general demurrer was filed. At the hearing, the Court sustained the demurrer, and Counsel for complainant excepted.

JNO. W. POWELL, for plaintiff in error.

, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] This bill, as it stands, has in it no equity. It contains no allegation, going to show the perpetration of any fraud on the purchaser, or going to show the invalidity of the judgments on which the *fi. fas.* were founded. The only thing it complains of is, that the defendant in the *fi. fas.* had no title to the property sold under the *fi. fas.* and purchased by the complainant. But this is no ground for an action, either at Law or in Equity. If it had been, Martin, the defendant in the *fi. fas.* himself, who had sold this land to the complainant, and who had made him a quit claim deed to it, and put him in possession of it, and who had himself received the purchase-money for it, the complainant, on failure of the title, would have had no right of action against him, Martin. In such a case, the maxim of *caveat emptor* would have governed. (*Broom's Leg. Max.* 354, 366, *and cases cited.*)

And the sale by the Sheriff could amount to no more than would such a sale as this by the defendant in *fi. fa.* if such a one had been made by him, have amounted to. The Sheriff, in such a sale, acts as agent of the defendant in *fi. fa.* to convey such title as the defendant has, if he has any, to the purchaser. He has no power to bind such defendant, by any warranty of title or other covenant.

The Court below was right, therefore, as we think, in sustaining the demurrer for want of equity, to this bill.

But as the Counsel for the plaintiff asks leave to amend the bill by allegations, to the effect that Martin, the defendant in the *fi. fas.* was a fictitious person, and that Riley, the plaintiff in the *fi. fas.* induced the complainant to purchase the land by fraudulent representations or fraudulent conduct, we think the complainant ought to have the leave; and that if he can so amend his bill, it ought to be re-instated.

No. 80.—DANIEL SANFORD, administrator, &c. plaintiff in error, *vs.* JAMES THOMPSON AND WIFE *et al.* defendants in error.

[1.] When an estate, in the hands of an administrator, to be administered, is so situated as to force upon the administrator the question, whether it is to be administered by the law of this State, or by the law of another State, the administrator may ask a Court of Equity to settle that question for him.

[2.] The laws of one State have force in the territory of another, as long as they do not come in conflict with the power or right of that State, or of any of its citizens.

[3.] If assets are to be administered according to the law of another State, and if all the claimants on these assets reside in that State, it is proper that they should be transmitted to the administrator appointed in that State, to be by him administered.

In Equity, in Monroe Superior Court. Demurrer. Decided by Judge STARK, March Term, 1855.

David S. Walker, a citizen and resident of Alabama, departed this life insolvent. He owed no debts in Georgia at the time of his death, nor had he ever resided here so that suits might have been brought against him. He was largely indebted in Alabama, in judgments recovered against him there, which were, at the time of his death, good and subsist-

ing judgments against him, unaffected by the Statute of Limitations; and that they are now good and valid there against his estate—not affected by the Statute in that State, but barred here. His creditors are all citizens of Alabama. Before his death, John T. Dunn, of Monroe County, Georgia, of whom the said David S. Walker was one of the heirs at law, departed this life; and the said David S. having died before he collected any part of the distributive share to which he was entitled, the plaintiff in error administered on his estate, and has collected the greater part of it from Dunn's administrator. The judgment creditors of Walker, in Alabama, have sued Walker's administrator in Monroe County, and with the *consent* of plaintiff in error, but not by his request; the Attorney of the heir at law of Walker, has filed the plea of the Statute of Limitations, in bar of the recovery of the judgments, and insists that he shall make that defence. The Alabama judgments, with the interests which have accrued thereon, exceed the amount of the assets in the hands of the plaintiff in error. James Thompson and his wife, Martha Jane, the latter of whom is charged to be the only heir at law of David S. Walker, have instituted a suit in Chancery to recover the whole of the assets of his estate, to the exclusion of his creditors, which suit is still pending. There are no effects of Walker, in Alabama, from which the judgments against him can be paid. There is an administration of the estate of Walker in the State of Alabama. The judgment creditors of Walker, in Alabama, insist that the assets of his estate shall be transmitted to Alabama, to be there distributed according to the law of decedent's domicil; or if distributed here, that they shall be distributed according to that law. The plaintiff in error, as administrator of Walker, filed his bill in Chancery, in the which the foregoing facts appear, and prayed the direction of the Court as to his duty. The defendants, Thompson and his wife, heirs at law of David S. Walker, demur to the bill on several grounds, to wit:

1st. The want of equity.

2d. That complainant is not entitled to the relief sought

and the decree prayed for, because it does not appear that there has been any administration on the estate of David S. Walker, in the State of Alabama.

3d. That the Court of Chancery of Monroe County, according to the case made, has no jurisdiction of the effects in his hands, for the purpose of transmitting them to the State of Alabama for administration there, at his instance, as administrator; and will exercise jurisdiction, for the purpose aforesaid, only at the instance and upon the application of some person legally entitled to receive them.

4th. That the Court has no jurisdiction for the purpose aforesaid, of the effects aforesaid, because there are no debts in said bill charged to be due and owing by said Walker, except those set forth in complainant's bill, and they are barred by the Statute of Limitations of the State of Georgia, and are thereby extinguished.

5th. That from the charges and allegations in the bill, all persons who are interested in the estate of the deceased, in the State of Alabama, either as creditors or distributees, are asserting their rights, by legal process, under the laws of Georgia, and have thereby elected to have the same adjudicated by the Courts and under the laws of said State; and, therefore, this Court will not grant the relief and award the decree asked.

6th. That complainant, in his said bill of complaint, charges and alleges, that debts are due and owing by the estate of said Walker, in the State of Alabama—are payable by the laws of said State; and on that account, and no other, asks a decree, that the effects in complainant's hands shall be transmitted to said State, and the said defendants, for demurrer, show that debts due by a person domiciled in a foreign State, or a claim upon effects within the jurisdiction of this Court, are payable under and according to the laws of Georgia, and not otherwise.

Argument being had upon the demurrer, the Court sustained the demurrer, and ordered the bill to be dismissed, and Counsel for complainant excepted.

CABINESS, for plaintiff in error.

HARMAN, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

The prayer of the bill in this case is, that the complainant, the administrator of David S. Walker, may be instructed "in his duty in administering the estate of the said David S. Walker, in all the matters" stated in the bill.

Those matters are, that the said Walker died a resident of Alabama; that he left unsatisfied several judgments which had been rendered against him by Courts of Alabama; that the plaintiffs in those judgments, who were also resident of Alabama, had sued the complainant as the administrator of Walker on the judgments; that the judgments were barred by the Statute of Limitations of Georgia, but not by the Statute of Limitations of Alabama; that one Thompson and his wife, who was the only child of Walker, had, as his next of kin, also sued the complainant as Walker's administrator, for the assets; that they were also residents of Alabama; that besides them, the creditors aforesaid, there were no other persons interested in the assets; that the administrator did not know whether the assets ought to be administered by the law of Georgia or by the law of Alabama; nor whether, if it were so that they were to be administered by the law of Alabama, they were to be so administered by him in Georgia, or were to be turned over to the administrator in Alabama, to be so administered by him in Alabama. The bill stated that there was an administrator in Alabama.

Now is this the statement of such a case as authorized the complainant to make to the Court the prayer aforesaid, viz: that he might be told by the Court how to administer the assets in the particular in respect to which, according to the statement, he did not know how they should be administered?

In *Comyn's Digest*, (*Chancery*, 3 *G.* 6,) it is said, "that

the most safe way for payment of legacies by an executor, is to take the direction of the Court of Chancery."

And in *Story's Equity*, (§544,) it is laid down, that "however correct these reasons may be for a refusal to interfere in ordinary cases, involving no difficulty, they are not sufficient to show that the Court ought not to interfere in behalf of an executor or administrator, under special circumstances, where injustice to himself or injury to the estate may otherwise arise."

And this position is certainly covered by *Buccle vs. Atle*, (2 *Vernon*, 37.)

The circumstances of this case are such, that the administrator himself, if not the estate, would stand a good chance to suffer improperly, should the administrator not obtain from the Court the instruction for which he prays. The question which troubles him, is one well calculated to trouble him. It belongs to a class of questions which are amongst the most difficult of any in the law—a class which, perhaps, may be comprehended under this general question: in what cases are the laws of one State operative in another State? Who can answer this question? Who can lay down a rule by which it may be answered? It is a question which the wise and the learned have grappled with in vain. It is not wonderful, therefore, that the question presented to this administrator by his case, was one which he did not know how to answer, for it belonged to this class.

For the present, then, I simply say that the question which this case forced upon the administrator, was a question of real difficulty. It was such a one, therefore, as he might easily decide wrong. And if he should have decided it wrong, the consequence would have been loss—improper loss to him personally, or perhaps to those entitled to the assets.

And according to what may be inferred from the passage in *Comyn's Digest*, and that in *Story's Equity Jurisprudence*, and from the decision in *Vernon's Reports*, a case involving a question of this kind, is a proper case to be presented to a

Court of Equity by an administrator, that it may solve the question for him.

Indeed, the reason of the rules on which the right of *interpleader* rests, if not the rules themselves, extends to a case like this. (*Story's Eq.* §800, *et seq.*)

[1.] Doubtless there is great danger of abuse of the right to bring such bills as the present, but we cannot say that we think the present bill is brought in the abuse of that right. On the contrary, we consider this bill to make out a case which entitles the complainant to the instruction for which he asks.

If we are right in this, the bill ought not to have been dismissed on the demurrer. And when we say this, we say all, perhaps, that in strictness of propriety ought to be said; for the only proper question on the demurrer was, whether or not the case made by the bill was a case which entitled the complainant to the instruction which he prayed for.

But other questions were made on the demurrer, and they were the main questions which were argued in this Court; therefore, this Court will express an opinion on them. These questions relate to what ought to be the instructions which should be given to the administrator, in the event that any ought to be given to him—questions manifestly more appropriate to a later stage of the case.

Of these questions, the chief one was, whether the assets were to be administered according to the law of Alabama or according to the law of Georgia? The domicil of the intestate and of *all* the claimants upon the assets, was, it will be remembered, in Alabama. No citizen or resident of Georgia had any right or interest involved in the case.

Such, then, being the case, was it one in which the assets were to be administered by the law of Alabama, or by the law of Georgia?

It is laid down by *Huberus*, in the third of his "axioms," that the rulers of empires, from comity, so manage things that the laws of every people in use, within its own limits, shall preserve, every where else, their force, as long as they

work no prejudice to the power or right of any other ruler and his citizens. His words are, "*Rectores imperiorum, id, comiter agunt, ut jura cujusque populi intra terminos ejus exercita teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium, praejudicetur.*" (*Story's conflict of laws*, §27, *note* 3.)

According to the English decisions, this axiom does not allow to international comity sufficient breadth; at least, not to that comity which relates to the law of administrations.

In *Bruce vs. Bruce*, in the House of Lords, Lord *Thurlow* said: "But to say that the *lex loci rei sitae* is to govern, though the *domicilium* of the deceased be, without contradiction, in a different country, is a gross misapplication of the rules of Civil Law and *jus gentium*," *&c.* (2 *Bos. & Pul.* 231, *note a.*)

In *Bempde vs. Johnstone*, Lord *Rosslyn* said: "and if the argument had raised a doubt in my mind, and I were not inclined to follow the rule that has prevailed in other cases, I am bound, by repeated decisions in the House of Lords, to make the decree I intend to make—that the Marquis had that domicil in *England*, that decides upon his succession to his personal property, and carries the distribution according to the laws of England. The point has been established in the cases in the House of Lords which, if it was quite new and open, always appeared to me to be susceptible of a great deal of argument: whether, in the case of a person dying intestate, having property in different places and subject to different laws, the law of each place should not obtain in the distribution of the property situated therein. Many foreign lawyers have held that proposition. There was a time when the Courts of *Scotland* certainly held so. The judgments in the House of Lords have taken a contrary course: that there can be but one law; they must fix the place of the domicil; and the law of that country where the domicil is, decides wherever the property is situated. That I take to be fixed law now." (3 *Ves.* 200.)

Upon the strength of these and other English decisions and

other authorities, Judge *Story*, in *Harvey vs. Richards*, (1 *Mass.* 407,) felt himself authorized to say: "In the first place, the distribution, whether made here or abroad, must be according to the law of the place of the testator's domicil. This, although once a question vexed with much ingenuity and learning in Courts of Law, is now so completely settled by a series of well considered decisions, that it cannot be brought into judicial doubt."

[2.] These decisions all give a breadth to comity in respect to the law of administrations and successions, far beyond that given to it by the axiom of *Huberus*. By that axiom, comity makes the foreign law operative only as long as it does not *prejudice any power or right of the domestic sovereign and his citizens*. We think, therefore, that that axiom may be safely followed. Indeed, it is, from its own nature and terms, a thing which can never so operate as to do either domestic, sovereign or citizen any *harm*.

But as to whether the decisions aforesaid, as interpreted in the language quoted from them, may be safely followed to the whole extent to which they go, we express no opinion. Speaking for myself, I must say that I doubt it strongly.

Considering, then, this axiom as true; that is, considering it to be really an axiom, the question is, whether this State or any of its citizens, would be prejudiced if the assets in the hands of Walker's administrator, should be administered according to the laws of Alabama? And the answer is, that neither this State nor any of its citizens *could* be prejudiced by an administration of the assets according to those laws; for neither this State nor any of its citizens, has any claim upon those assets the sole claimants upon them being citizens of Alabama.

It follows, that the assets ought to be administered according to the laws of Alabama.

[3.] If, then, the assets are to be administered according to the laws of Alabama, who is the person so to administer them—the administrator in Alabama or the administrator in Georgia? This we regard as a question of mere expediency;

question as to the solution of the best means to accomplish
end. And in this case, it seems to us plain, that the best
ans to accomplish the end, would be an administration of
assets in Alabama or by the Alabama administrator. Is it
ot certain that, if so administered, the chances are greatest
hat they will be administered according to Alabama law?
And that is the end to be attained.

It is far less likely that Alabama citizens and Alabama
Courts, will make a mistake as to what is Alabama law, than it
is that Georgia citizens and Georgia Courts will make such a
mistake.

One of the grounds of the demurrer was, that an order that
the assets should be transmitted to the administrator appoint-
ed in Alabama, would be made only at the instance of "some
person legally entitled to receive them."

Of course, if no person legally entitled, by the law of Ala-
bama, to receive these assets, applies for them to the admin-
istrator appointed in Georgia, the latter must, himself, ad-
minister them; and in doing that, he will have to proceed, as
best he can, by the law of Alabama.

Another of the grounds of demurrer was, that the judg-
ments, on which were founded the suits by Walker's creditors,
were barred by the Statute of Limitations of this State.

Admit this to be so; yet, of what concern is it, if the as-
sets are not to be administered by the law of Georgia, but by
the law of Alabama?

As to whether this, however, is really so or not, I desire
to say, that what I individually think, is to be found in what
I said in *Bishop vs. Sanford*, (15 *Ga. R.* 1.)

Another, and the only remaining ground of demurrer was,
that the creditors and next of kin, had *elected* to sue the ad-
ministrator appointed in Georgia. But are such suits evi-
dence that the suitors prefer an administration of the assets
in Georgia, to an administration of them in Alabama? Wh
else could the suitors do, as long as the assets remained
the hands of the Georgia administrator, but sue him? H
could *they*, creditors and next of kin, as they were, get

assets out of his hands into the hands of any one in Alabama?

But suppose that *they* did prefer an administration which should be in Georgia, is that decisive of the question? Even in that case, ought not the assets to be administered where they will be best administered? Ought they not to be administered by that administrator who will be likely to make the fewest mistakes in their administration? Are considerations that concern the administrator's safety to have no weight?

This, we think, is not a sufficient reason why the administration should be carried through in Georgia, rather than in Alabama.

No. 81.—JOHN HARDEN AND WIFE *et al.* plaintiffs in error, *vs.* WILEY E. MANGHAM, executor, &c. defendant in error.

[1.] C H. by one of the clauses of her will, bequeathed certain negro slaves, as follows: "As manumission is, by the laws of the State, forbidden, (which I could have wished otherwise,) I will and bequeath to Wiley E. Mangham, my trusty and faithful servants, Charity and Starling, to have and to hold unto him and his executors forever, in fee, with the very urgent request that he and they will treat said negroes kindly and affectionately, and watch over and protect them—finding them a comfortable home, and allowing them as many privileges and liberties as the laws of the State will permit negro slaves to possess or enjoy:" *Held*, that such bequest was not in conflict with the laws of our State, prohibiting manumission.

Caveat, in Pike Superior Court. Tried before Judge STARK, April Term, 1855.

Mrs. Christiana Hall died, having first made and published her last will and testament, appointing Wiley E. Mangham

her executor. The 5th item of said will reads as follows: "As manumission is, by the laws of the State, forbidden, (which I could have wished otherwise) I will and bequeath unto Wiley E. Mangham, my trusty and faithful servants, Charity and Starling, to have and to hold unto him and his executors forever, in fee, with the very urgent request that he and they will treat said negroes kindly and affectionately, and watch over and protect them—finding them a comfortable home, and allowing them as many privileges and liberties as the laws of the State will permit negro slaves to possess or enjoy."

When the will was propounded for probate, plaintiffs in error, heirs at law of Mrs. Hall, caveated the same upon the following, among other grounds:

"Because, said instrument in writing is in violation of the laws of this State, enacted against the manumission of slaves." On the trial, Counsel for caveators asked the Court "*to* declare and charge the Jury, that the fifth item of said will was void, and rendered the whole of the will void, being illegal and in fraud of the laws of the State;" which charge the Court refused to give, and Counsel for caveators excepted.

O. C. GIBSON, for plaintiffs in error.

H. & J. G. GREEN; MARTIN, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] If the words used by the testatrix in the bequest of these slaves to Wiley E. Mangham, were considered without reference to any question as to manumission, there could be no doubt that the conclusion would instantly be, that the effect of them was to create a fee simple title in Mr. Mangham.

The testatrix says: "I will and bequeath unto Wiley E. Mangham my trusty and faithful servants, Charity and Starling, to have and to hold unto him and his executors forever,

in fee." And then she couples with the bequest a request, that they shall be indulgently treated, &c.

Now it is true that the gift is to Mr. Mangham *and his executors*, and not to his heirs, representatives and assigns, which is the more formal and usual method of conveyances in fee. But such a conveyance as that before us, by our laws, and especially by the second section of the Act of December 21st, 1821, standing by itself, would be held to vest an absolute, unconditional fee simple estate in the person to whom the same was executed. Is there any thing in this will, going to show that "a less estate" was intended to be "mentioned and limited in the bequest?"

On the contrary, we think that the above language, with its context, clearly manifests an intention to give the negroes absolutely, and as slaves, to Mr. Mangham, and not in trust to him, as is insisted. 1. The testatrix recognized the fact, that manumission is forbidden in our State, and says, that as she cannot manumit them, she will "give and bequeath them to Wiley E. Mangham," &c. 2. She gives the negroes to him, "to have and to hold unto him and his executors forever, in fee." Thus, in the employment of the words, "forever, in fee," using apt words for the creation of an absolute estate. 3. In adding a request for their kind treatment, she recognizes the right of Mr. Mangham to possess and control these negroes, by asking that he will treat said negroes kindly, &c. "*allowing* them as many privileges and liberties as the laws of the State will permit," "watch over and protect them," "*finding* them comfortable homes," &c. 4. She asks that he will allow them as many privileges, &c. "as the laws of the State will permit *negro slaves* to enjoy." Thus, also, recognizing their *status* in his possession, as that of slaves.

These are, substantially, the provisions of the will on this subject; and whilst they indicate, plainly, a desire, that in consideration of their faithful services, these slaves should be treated with all the humanity and indulgence which the laws would permit, they, at the same time, manifest an intention to convey the slaves, absolutely and in fee simple, to Mr.

Mangham; and consequently, are not in conflict with our laws prohibiting manumission.

The Act of 1818 declares—1. That every instrument in writing, *whether by way of trust or otherwise, made and executed for the purpose of effecting, or endeavoring directly to effect, manumission of a slave or slaves, shall be null and void. 2. That such instruments, executed for the purpose of effecting, or endeavoring to effect, manumission, indirectly and virtually, by allowing and securing to such slave or slaves the right or privilege of working for him, her or themselves, free from the control of the master or owner of said slaves, or of enjoying the profits of his, her or their labor and skill, shall be void.*

We have shown that this testatrix has not used words which manifest an intention to effect the manumission of these slaves *directly*. And we have also shown, that she has not *indirectly* done this, by so bequeathing them that they might be free from the control of a master, and enjoy the profits of their labor, but has recognized the right of their master, to whom she has given them, to control and use them as slaves, by requesting that he would *allow* them such privileges, &c. as the law would permit *negro slaves* to enjoy.

It follows, that these slaves were bequeathed to Mr. Mangham in fee simple; are his property; may descend to his heirs, and may be alienated by him, or sold for his debts.

It is true, that he takes them subject to the strong moral obligation which the terms and character of the gift impose upon him; for the proper discharge of which, he is responsible only to his conscience and his Maker.

To give the construction insisted on by the plaintiff in error to such a will as this, would be, in effect, to hold that the owner of slaves, aged and infirm it might be, to whom he was attached by the pleasant memories of childhood, by the holy emotions of gratitude for long and faithful services to himself and his family, by the ties of a life-time association, in contemplation of his dying hour, could not make, without violation of law, some provision for the purpose of saving them from be-

ing subjected to the chances of coming into the hands of strangers or of hard task-masters, by bequeathing them to some friend, of such means and character as would serve to give assurance of their future kind treatment, and by requesting that such friend, whilst controlling and holding them as slaves, would extend to them such privileges and indulgence as were compatible with law. We repudiate such a doctrine.

Let the judgment be affirmed.

No. 82.—JAMES W. POOLE *alias* JAMES VICKHOUSE, plaintiff in error, *vs.* THE STATE OF GEORGIA.

[1.] Where, in order to get a continuance, the defendant designates the names and residence of his absent witnesses, it is competent for the Court—indeed, a highly commendable practice—to suspend the trial, until an officer can be despatched with process, to procure the attendance of the witnesses; and if it be ascertained that the persons named are fictitious, the cause will proceed.

[2.] Public excitement is not a sufficient ground for the postponement of the trial of a petty offence: especially where five months have elapsed since it was committed.

Indictment for simple larceny, in Macon Superior Court. Tried before Judge POWERS, March Term, 1855.

The defendant, Poole, was arrested on the 13th day of March, 1855, for stealing a slave, the property of James S. Hollingshead, and committed to jail. The Grand Jury of Macon County, on the 27th day of the same month, found and returned a bill of indictment against him for the offence.

The case came on for trial, when the defendant moved for a continuance, upon the grounds—

1st. That there is great excitement and prejudice against prisoner in the public mind, so that he could not have or obtain, at the present term of the Court, a fair and impartial trial.

2d. Because the defendant has not been able to have J. B. Jones, of DeKalb County, and sundry citizens—among them Alfred Dean, of Marshall County, State of Alabama, subpœnaed, by whom he is able to prove, that on the day, 16th October, 1854, when it is charged the crime was committed, defendant was in the County of Marshall, in the State of Alabama.

The Court did not hurry on the trial, but despatched an officer of Court to DeKalb County, Georgia, and to Marshall County, State of Alabama, with process for the witnesses named by the defendant.

The officer having returned, the case was again taken up. The defendant insisted upon his motion for a continuance, upon the grounds stated. The officer being sworn, stated that he could not find or hear of such persons as J. B. Jones or Alfred Dean, in DeKalb and Marshall Counties, and that he had made diligent inquiry of the Clerks of the Courts and the Sheriffs, in those counties.

The Court over-ruled the motion for a continuance, and Counsel for defendant excepted.

COOK & MONTFORT, for plaintiff in error.

Sol. Gen. DEGRAFFENREID; HALL, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

Every person against whom a bill of indictment is found, shall be tried at the term of the Court the indictment is found, unless the absence of a material witness or witnesses, or the principles of justice, shall require a postponement of the trial.

[1.] Was there any material witness or witnesses for the defendant absent, to make a postponement of the trial neces-

sary or proper in this case? He, Pool, pretended so; but the Court, in the exercise of that diligence which cannot be too highly commended, ascertained that the showing, under the pretext of procuring proof, was for delay only; and therefore, very properly refused a continuance on that ground.

[2.] Was there any merit in the other branch of the application? We think not. The offence was committed in October, 1854; the prisoner was put upon his trial in March, 1855. Surely here was cooling time. We take occasion to say, that this ground, itself, namely: public excitement, has been greatly perverted. It was intended to apply to those higher crimes which always agitate the public mind to a great degree, and when man must be allowed a certain interval to pause and think, and throw off the overwhelming influence pervading the whole community, and swaying it as the forest is bent before the hurricane. But here is an attempt to apply the case of Aaron Burr or Dr. Webster to a simple larceny!

We repeat the hope, that the Courts will imitate the admirable precedent set by Judge POWERS on this occasion, and *suspend* the case until efforts are made to collect the testimony of these unfortunate defendants, who, on account of their confinement in jail, &c. &c. have not had an opportunity of subpœnaing their witnesses. It is humane in the Courts, acting as Counsel for prisoners, to despatch their Bailiffs and perform this service for them. The principles of justice will, by pursuing this course, neither be defeated by hurrying prisoners prematurely to trial, nor by granting a continuance, enabling them to escape jail, as they do in so many cases, before the trial term arrives. Let it be understood that efforts will be made to procure the attendance of witnesses, real or pretended, and it will cut off the temptation to those barefaced perjuries that we have every reason to apprehend are too frequently committed for the sake of delay.

No. 83.—MARTHA BOOTH, plaintiff in error, vs. RICHARD TERRELL, defendant in error.

[1.] Where H loaned property to T and his wife, for the life of the latter, with the understanding, that at her death, the same "should be returned to his daughter M:" *Held*, that this was not an attempt to vest a remainder in M by parol gift; and that she might sue for and recover the property from T, after the death of his wife.

Trover, in Newton Superior Court. Tried before Judge STARK, March Term, 1855.

This was an action of trover brought by John P. Booth and his wife, Martha Booth, against Richard Terrel, for the recovery of eight negro slaves, to wit: Letty and seven chilren, named in the declaration. Pending the action, John P. Booth died, and the same proceeded in the name of the wife.

The defendant pleaded the general issue and the Statute of Limitations.

On the trial, plaintiff proved by two witnesses, that in the year 1820, in Jefferson County, Richard Hodges, the father of Mrs. Booth, *loaned* Letty, the negro woman sued for, to Richard Terrell and his wife, for and during the life-time of the latter, with the understanding, that at the death of Mrs. Terrell, the said girl Letty should be returned to his daughter, Martha Hodges, the plaintiff in the action. Plaintiff also read in evidence the will of Richard Hodges, the 2d item of which read as follows: "I give and bequeath to my daughter, Martha Hodges, eleven negroes, named as follows: Mary and her four children, (naming them and others,) and Letty—the last named in the possession of Mrs. Terrell, and to remain so during Mrs. Terrell's natural life; then to become the property of my daughter, Martha Hodges." The plaintiff also proved the death of Mrs. Terrell, the conversion and value of the negroes, and closed.

The defendant introduced testimony which it is unnecessary to set out here.

The Court charged the Jury: "if Hodges had title, and loaned the property to Mrs. Terrell for life, and at her death to be returned to him or his heirs: if this state of facts has been proven, it shows that Hodges never intended to part with the dominion of the property; and the plaintiff, on this state of facts, must recover. If Hodges had title and loaned the property to Mrs. Terrell for life, to be delivered, at her death, to the plaintiff, this is an attempt to create an estate in remainder by parol, which cannot be done; and the dominion of the property having been parted with by the lender, it vested an absolute fee simple estate in Mrs. Terrell, and through her in her husband; and if this state of facts has been proven, your finding must be for the defendant."

To which charge, Counsel for plaintiff excepted.

EZZARD; CLARK, for plaintiff in error.

FLOYD, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

We think that the Court below erred in so framing his charge, that the Jury might infer, from the language used, that though a loan from one person to another were *gratuitous;* yet, if the property were to be delivered to a third person at the termination of the loan, the lender had parted with all dominion over it from the beginning, and the transaction amounted to a gift to the first taker.

The Court says: "If Hodges had titles, and loaned the property to Mrs. Terrell for life, to be delivered, at her death, to the plaintiff, Martha Booth, this is an attempt to create a remainder by parol, which cannot be done; and the dominion over the property having been parted with by the lender, it vested an absolute fee simple estate in Mrs. Terrell, and through her, in her husband."

The predicate for the conclusion which the Court draws, viz: that a fee simple vested in Mrs. Terrell is, that the

property was loaned to her for life, to be delivered at her death. If Hodges, says the Court, *loaned the property, for life, to Mrs. Terrell, to be delivered, at her death, to the plaintiff, that vested an absolute fee simple estate in Mrs. Terrell.*

According to this reasoning, it follows, therefore, that though the loan was gratuitous, and was intended to have nothing but the characteristics of a *gratuitous loan*, one of which is, that it must "rest upon the good pleasure and faith of the lender," and is "strictly precarious." (*Story on Bail*, §258, *and cases there cited.*) Yet, if the property was to be delivered to the plaintiff at the death of Mrs. Terrell, it amounted to a gift. This proposition is equivalent to the declaration, that though, by the transfer of the property to the plaintiff, the lender, Hodges, intended to loan the property, and not to part with dominion over it; yet, by such transfer, he did part with dominion over it, because it was not to return to him upon the death of the bailee.

We cannot recognize the correctness of this proposition. On the contrary, it appears to us, that in the very nature of terms, the lender did not part with dominion over the property, so far as the right to withdraw it from the possession of Mrs. Terrell was concerned, if it were a *gratuitous loan* to her; and therefore, the conclusion of the Court was erroneous.

But it is urged that the meaning of the Court may have been, that if Hodges *had* parted with dominion over the property, by the loan to Mrs. Terrell, this gift was an attempt to create a remainder by parol, whether he had said, or not, that he *loaned* the property.

Two criticisms are to be made upon this observation: 1. Such seems not to have been the way in which the Court desired to be understood, as we infer from the fact, that the learned Counsel, in his argument, has presented the view which we attribute to the Court. 2. If the meaning of the Court were such as last suggested, he did not clearly express himself, so that the Jury might understand the difference between such a parting with the property, and a mere gratuitous loan, in

which the owner did not intend to part with dominion over it; and therefore, the Court erred.

Let the judgment be reversed.

No. 84.—EDWARD J. DAWSON, plaintiff in error, *vs.* JAMES CALLAWAY, defendant in error.

1.] The execution of a commission to take testimony, was, in all respects, regular, except that it lacked the words, "answered, subscribed and sworn to before us," just above the place where the commissioners signed their names. The depositions were, in fact, signed by the witness. The commission thus executed, lay in office for more than three years. During the trial, the defendant objected to the execution of the commission, because the return lacked the words aforesaid. The Court ruled out the testimony: *Held*, that the Court, instead of ruling out the testimony, should have required the defendant either to waive the objection or submit to a general continuance of the case.

[2.] The opinions of a witness do not, in general, amount to evidence.

[3.] A witness swore, in reference to the execution of a bill of sale, as follows: "I did sign the said bill of sale as an attesting witness; I saw said Jesse Coe execute said bill of sale, to said Susannah Watts, (as I supposed) for the purposes therein mentioned:" *Held*, that this was enough to make the bill of sale admissible to the Jury.

[4.] [5.] Declarations accompanying possession and explanatory of it, are admissible as evidence for the declarant and those claiming under him.

[6.] [7] A deceased person is represented, by his executor, *de son tort*; and also, by that executor's executor, *de son tort*—so that if the relationship of the deceased person to another, is such that the Statute of Limitations will not run in his favor, theirs is such that it will not run in their favor.

[8.] The Statute of Limitations can be pleaded by those in whose favor it operates, and by those claiming under them, and by no others.

[9.] If one side examines a witness, though only on a single point, the other has the right to cross-examine him on every point.

Trover, in Meriwether Superior Court. Tried before Judge BULL, February Term, 1855.

This was an action of trover, brought by Edward J. Dawson against James Callaway, for the recovery of four negroes —Patsey and her three children.

The defendant pleaded the general issue and Statute of Limitations.

On the trial, the plaintiff proposed to read the evidence of David Dawson, taken by commission. The interrogatories were filed in Court, in August, 1851, and the trial was had in February, 1855. No objection having been filed, the defendant objected to the evidence, because the commissioners did not, at the foot of the answers of the witness, say: "Answered, subscribed and sworn to before us." The usual certificate preceded the answers, in which it was stated that the witness "had answered, after being duly sworn," &c. The Court sustained the objection, and plaintiff excepted.

The facts of this case, as appeared from the evidence, were as follows: On the 17th of March, 1815, Jesse Coe executed a bill of sale to Susannah Watts, for a negro girl, Charity, (the mother of Patsey,) the consideration being $375.

At the time, Susannah Watts and her brother John Watts, and Milly Watts, were living together, and continued to do so, and exercise acts of ownership over the negro girl, Charity, until, according to the statement of one witness, the year 1821, and according to another witness, until the year 1827. The Watts' family then separated, and the negro, Charity, was left in the possession of John Watts. In 1839, John Watts died in the County of Meriwether, in possession of the negroes. There was no administration upon his estate. The negroes went into the possession of his widow, who kept them until 1845, when she died, and the negroes went into the possession of her daughter, the wife of the defendant, who had them in possession at the time of their intermarriage. Mrs. Callaway was of age at the time of the death of her mother.

The plaintiff then read the evidence of George Watts, to prove the execution of the bill of sale from Jesse Coe to Susannah Watts, as follows: "I did sign the said bill of sale, as an at-

testing witness. I saw Jesse Coe execute said bill of sale to Susannah Watts, (as I supposed,) for the purposes therein mentioned."

To the cross-interrogatories, the witness stated—"my reasons about the purchase money is this: I believe John Watts counted the money down, (for Charity)—don't know whose money it was, nor do I know when carried to the place. It was and is my opinion, that if Susannah Watts had the money, she must have got it from John Watts."

To which plaintiff objected; the Court over-ruled the objection and plaintiff excepted.

Plaintiff then proposed to read in evidence the bill of sale, to which defendant objected, "because the witness did not say he was present at the time of its execution, and did not say he saw it signed, sealed and delivered; and that the name of George Watts plainly appeared to be signed with different ink from that of the other witnesses."

The Court sustained the objection, and plaintiff excepted.

Plaintiff then proposed to read in evidence so much of the depositions taken by the defendant for the same witness, as showed that he was present at the execution of the bill of sale. The defendant insisted that plaintiff could not read a portion without reading all of the answers of the witness. The Court so ruled, and plaintiff excepted.

Plaintiff then proceeded to read said depositions—objecting to the following portions, in which the witness stated: "I do not know, but think John Watts counted the money to Coe, for the negro Charity. I was acquainted with the means and circumstances of Susannah Watts at that time. If she had the means to buy negroes, I think she obtained it through John Watts." "John Watts had the means to buy negroes, unless he had previously transferred them to Susannah Watts. I know of no other reason to induce John Watts to have the bill of sale for Charity made to Susannah Watts, than that he feared he might be involved by his wife, who had left him. I do not know, positively, but *think* that John Watts had paid over the amount of the purchase money for the negroes."

The plaintiff objected to this portion of the evidence, as above stated. The Court over-ruled the objection, and plaintiff excepted.

Plaintiff then read in evidence the depositions of Benjamin and Milly Dawson—the following portions of which were objected to by the defendant and ruled out by the Court, and plaintiff excepted: "After the negro was brought home, Susannah Watts claimed the negro." "During their stay in Hall, Susannah Watts made a deed of gift of Charity to John Watts' oldest daughter, Susannah." "Susannah Watts heard, in the Spring of 1849, that John Watts was dead, and his family in Meriwether County." "He (Benj. Dawson) wrote letters, at various times, to people in Hall and Jasper Counties, to know where John Watts had gone, but never heard any thing from him." He further says: "in the Spring of 1849, Thomas Bloodworth, brother-in-law of his, wrote him from Columbus, or near there, that John Watts had returned to Georgia, and his family and the negroes were in Meriwether County;" and this was the first time Susannah Watts had heard of him since he left Hall. This latter portion, not in brackets, was not objected to.

Plaintiff then read in evidence a deed of gift from Susannah Watts to the plaintiff, for the negroes, Patsey and her children, dated on the 25th day of July, 1849.

Plaintiff then introduced the defendant, to prove the existence and value of a child, born since the commencement of the suit, which he did.

Defendant's Counsel then proposed to examine the defence on the merits of the case not touched upon by the direct examination. Plaintiff objected. The Court over-ruled the objection, and plaintiff excepted.

The Court charged the Jury as follows:

That no administration on the estate of John Watts or his widow, was shown; the possession of John Watts and his widow, and afterwards of his daughter, were seperate and independent possessions. That, therefore, if John Watts

was the bailee of Susannah Watts, though the Statute of Limitations did not begin to run in his favor until he proved knowledge of the conversion to Susannah Watts; or if he had fraudulently concealed the property, the Statute could not run until a discovery of the fraud; yet, that these rules did not apply to the possession of his widow—that her possession being a separate one, could not be affected by his fraud, or bailment, or contract; and that if the Jury should believe that the widow of John Watts held the property adversely, four years after the death of John Watts, using it as her own, and converting it to her use, then she had a good title to it, unless she had fraudulently concealed it from Susannah Watts; and this defendant could plead this outstanding title by the Statute in Mrs. Watts, in bar of this action, though he might not claim under her, nor tack her possession to his to create a bar by the Statute of Limitations. And to this charge plaintiff excepts.

Further—that the possession of Miss Watts was *separate* from that of her father and mother; and she would not be affected by the character of their possessions or their frauds. And that though she held the property as a trespasser, yet, that on her marriage with defendant, her possession became his possession—that their possessions were one; and if more than four years had elapsed from the commencement of the possession of Miss Watts to the bringing of the suit, that the plaintiff was barred and they must find for the defendant. And to this charge plaintiff excepts.

The plaintiff's Counsel asked the Court, in writing, to charge the Jury, "that if the possession of defendant is a possession *through* John Watts, or *under* him, he is in no better condition that John Watts." The Court refused, absolutely, to give this charge, remarking, "there was not a scintilla of evidence to support it; that there was no evidence that defendant received the property by descent;" and to this refusal plaintiff excepts.

The plaintiff's Counsel asked the Court, in writing, to charge

the Jury, "That possession, to mature a title under the Statute of Limitations, must be adverse and continuous, and continuously adverse; and that if the possessions of Mrs. Watts and Miss Watts, and defendant, are *separate* possessions, the defendant can claim no benefit from any possession prior to his own." The Court gave this charge with a qualification, to-wit: that if Mrs. Watts held the property more than four years, and had a statutory title, the defendant could plead it in bar of this action, though he did not claim under Mrs. Watts. And to this refusal and qualification, the plaintiff excepts.

B. H. HILL, for plaintiff in error.

DOUGHERTY; WARNER; MOORE; HALL, for defendant.

By the Court.—BENNING, J. delivering the opinion.

It appears, upon the face of the return of the commissioners to examine David Dawson, that David Dawson *signed* the depositions returned.

It is very doubtful, therefore, whether enough does not appear upon the face of that return to show the commission to have been well executed—very doubtful whether enough does not appear upon the face of the return, to show that the depositions were, in fact, "answered, subscribed and sworn to" before the commissioners, by the witness. I, myself, am very much disposed to think that there does appear enough to show that.

And then, the interrogatories had lain in office for more than three years. And the 47th rule of Court requires all objections to the execution and return of interrogatories, on appeal trials, to be made before the cause has been submitted to the Jury. The case was on the appeal. The plaintiff's continuances were exhausted.

[1.] We think the most the Court could have done on this objection to the execution of the commission, would have been

to present to the defendant the alternative, either to waive the objection or submit to a general continuance of the case.

Several parts of the answers of George Watts consisted in mere matter of opinion; and therefore, should not have been read to the Jury, against the objection of the plaintiff. These parts are as follows: 1. A part of Watt's answer to the first cross-question in the plaintiff's set of interrogatories for him, in the following words: "it was and is my opinion, that if Susannah Watts had the money, she must have got it from John Watts." 2. A part of Watts' answer to the second direct interrogatory in the defendant's set of interrogatories for him, in the following words: "I do not know, but think John Watts counted the money to Coe for all the negroes." "If she had the means to buy negroes, I think she obtained it through John Watts." 3. A part of his answer to the first cross-interrogatory of this same set, in the following words: "I have already stated, in 2d interrogatory, that John Watts counted the money to Coe—I think, I cannot say, positively, it was John Watts' money. If Susannah Watts had the means, I think it came through John Watts." "I do not know, positively, but *think* that John Watts had and paid over the amount of the purchase money for the negroes."

[2.] As it appears to us, the witness intends, by these answers, to give nothing but his opinions. If so, the answers were, of course, not proper to go to the Jury.

George Watts, as to the execution of the bill of sale, swore, in answer to the plaintiff's interrogatories, as follows: "I did sign the said bill of sale, as an attesting witness. I saw said Jesse Coe execute said bill of sale to said Susannah Watts, (as I supposed,) for the purposes therein mentioned." This, the Court held, did not prove the bill of sale sufficiently to make it admissible to the Jury. But we think it did. If this statement be true, the most obvious, if not the necessary inference from it is, that the witness saw the bill of sale signed and delivered; that he was present when that was done, and that he attested the doing of it. A statement from which

such an inference may be drawn, is certainly sufficient to carry the instrument to which it relates to the Jury.

Any objection to the word "execute," on the score that it expresses a conclusion rather than a fact, would equally lie to any one of the words, sign, seal, deliver.

It appears, that at the time when the slave, Charity, was purchased, and for a while afterwards, Susannah Watts and John Watts lived together.

[4.] And thus living together, *prima facie*, by presumption of law, they were in the joint possession of the slave. Any declaration of either, made while they were so living together, explanatory of the nature of the possession, would therefore be admissible as evidence, for the one which made it, under the principle of the *res gestæ*. (1 *Greenlf. Ev.* §108, *and cases cited.*)

Milly Dawson, a witness, swore this: "she knows, after the negro was brought home, Susannah Watts claimed the negro." This declaration of Susannah Watts, was explanatory of the nature of the possession which she had of the negro. It went to show the possession to be one in her own separate right. The declaration was therefore admissible in favor of her and of those claiming under her, according to the above stated principle.

This witness also testified to this: "during their stay in Hall, Susannah Watts made a deed of gift of Charity to John Watts' oldest daughter, Susannah." If this was true, the deed, itself, was better evidence of it. And nothing appears to show the deed not to have been within the possession or the power of the plaintiff. And unless something of this kind appears, none but the best evidence is to be received.

It was right of the Court, therefore, to reject this testimony.

This witness and her husband, Benj. Dawson, jointly, testified as follows: "They say Susannah Watts lived constantly with them from the time John Watts went from Hall County. They know she did not know where John Watts had gone; their reasons for saying so, is because they often heard her

say so, and because she made many efforts to find where he was." "*Because they often heard her say so*," was objected to by the defendant, and ruled out by the Court.

[5.] Taking this whole statement together, we understand the witnesses to mean, that these sayings of Susannah Watts were made during the time when she was making "the many efforts to find where he was," of which they speak. If we are right in this, these sayings were the natural, if not the necessary accompaniments of those efforts; and so, were admissible as evidence, under the principle of the *res gestæ*, in the same manner as was her declaration, above noticed, explanatory of her possession of the slave Charity.

Was the charge of the Court below right?

The main proposition in the charge was this: "that as no administration on the estate of John Watts or his widow was shown, the possessions of John Watts and his widow, afterwards of his daughter, were separate and independent possessions." And this proposition was one which we think might or might not have been true, according as the facts might import one or another of two things. If the import of the facts was, that the possessions of the widow and of the daughter, were respectively acquired in any other manner than as the successive representatives of John Watts, then it was true that the possessions of the widow and of the daughter, were "separate and independent possessions." But if the import of the facts was, that these possessions, which the widow and the daughter had, were acquired by them as the representatives of John Watts, then it was not true that the "possessions were separate and independent possessions." And that "no administration on the estate of John Watts or his widow was shown," was by no means conclusive that the widow did not represent John Watts—and by no means conclusive that the daughter did not represent the widow. If the widow took possession of the slaves as the executor in her own wrong, of John Watts, she held the slaves as the representative of John Watts; and if the daughter took possession of the slaves, as the executor in her own wrong, of the widow, she held the

slaves as the representative of the widow; and therefore, as the representative of John Watts.

An executor in his own wrong, may be such representative.

An executor in his own wrong, is subject to an action by the rightful executor, by the creditors and by the legatees. (*Wentworth Ex'rs*, 331, *and note* (1). *Wms. Ex'rs*, 141, *and notes* (*h*) *and* (*i*).

"All lawful acts which an executor *de son tort* doth, are good." (*Id.* 145, *quoting from Coulter's Case*, 5 *Co.* 30 *b.*)

Such an executor is to "be sued, generally, by the name of executor of the last will and testament of the defunct." (*Went. Ex'rs.* 328.) So, such an executor may be sued, jointly, with the rightful executor, if there is one. (*Id. Ibid.*)

An executor in his own wrong, then, it is clear, is the representative of the deceased person whose estate he takes into possession.

Therefore, it may be that the import of the facts in this case is, that the widow of John Watts was, as to the possession of the slaves, the representative of John Watts; for that import may be, that she took possession of the slaves as executor in her own wrong.

And in like manner, the executor in his own wrong, of an executor in his own wrong, may be the representative of such first deceased person.

This would seem to be a proposition that follows from the principle, that "the executor of an executor, how far soever in degree remote, stands, as to the points both of being, having and doing, in the same state and plight as the first and immediate executor;" (*Went. Ex'rs*, 462, *and note* 1;) for an executor in his own wrong, is an executor. And then, to hold the contrary, we should have to say that an executor in his own wrong, has a situation, in some particulars, more advantageous than that which a rightful executor has.

This proposition would seem to be also involved in the 11th section of the Act of 1792, to protect the estates of orphans, &c. which section is as follows: "All and every the executors and administrators of any person or persons who, as ex-

cutor or executors, in his or their own wrong or administrators, shall waste or convert any goods, chattels, estate or assets of any person deceased, to their own use, shall be liable and chargeable in the same manner as their testator or intestate would have been, if they had been living." (*Pr. Dig.* 229.)

And this proposition seems to be expressly affirmed by the Act of the 43 of *Elizabeth*, against fraudulent administrations. That Act says: "that every person and persons that hereafter shall obtain, receive and have any goods or debts of any person dying intestate," "upon any fraud, as is aforesaid, or without such valuable consideration as shall amount to the value of the same goods or debts, or near thereabouts, (except it be in or towards satisfaction of some just and principal debt, of the value of the same goods or debts to him owing by the intestate, at the time of his decease,) shall be charged and chargeable as executor in his own wrong," &c. (*Schley's Dig.* 234.)

And this proposition seems to be a consequence of the doctrine of Equity, "that where the trust property has been improperly disposed of, and is capable of being followed *in specie*," a Court of Equity "will compel the trustee or the party in possession (if the latter have taken with notice of the trust) to re-convey the estate to the purposes of the trust." (*Hill on Trustees*, 522.)

From all this, we think it safe to conclude that an executor in his own wrong, of an executor in his own wrong, represents the first testator or deceased person.

[5.] The daughter then, as well as the widow, her mother, might, in this case, have been the representative of John Watts, after his decease, although it was so that no will was left by him, and that no administration was granted on his estate; for she might have been the executor in her own wrong of her mother, and her mother might have been the executor in her own wrong of John Watts; and if they had been such executors, that would, according to what has been said above, have made them successive representatives of John Watts.

Whether either was such executor or not, was a question which depended on the import of the facts in evidence.

If they were such, then it follows, that if John Watts was, with respect to the slaves, the bailee or trustee of Susannah Watts, they were equally, each in succession, such bailee or trustee.

[7.] And if this relationship of bailee and bailor, or trustee and *cestui que trust*, subsisted between Watts, his widow and daughter, successively, on one side, and Susannah Watts on the other, then the Statute of Limitations could no more begin to run in favor of the widow and daughter, respectively, until they had converted the property—the slaves—to their own use, and Susannah Watts had obtained knowledge of such conversion, than it would begin to run in favor of John Watts, himself, until these things had happened, as to him.

And this is what the Court should have told the Jury.

The facts in evidence had three aspects, each demanding a charge.

If the case was, that John Watts, and not Susannah, really bought the slave, Charity, then she was his to a certainty.

If the case was, that Susannah Watts, and not John, really bought the slave, then, still, if John, as a *trespasser*, converted the slave to his own use, the Statute of Limitations commenced running in his favor, from the moment of such conversion; and so, by the time of trial, would have made, for him and those claiming under him, a bar to an action for such conversion.

If, however, the case was, that Susannah, and not John, bought the slave, and that John got possession of the slave as bailor from Susannah, or as trustee for her, and the possession under this relationship continued in him until his death, and then passed into his widow, as his executor *de son tort*, and remained in her until her death, and then passed into her daughter, as executor *de son tort* of the widow, and remained in her until her marriage with Callaway, then, up to the time of this marriage, the Statute of Limitations had not commenced running at all. In short, if this relationship ever existed

at all, that Statute did not commence running until the relationship terminated; and if the relationship terminated by means of a conversion of the property, not until that conversion and notice, or knowledge of it, had come to Susannah Watts.

The Court below told the Jury, "that if Mrs. Watts held the property more than four years, and had a statutory title, the defendant could plead it in bar of this action, though he did not claim under Mrs. Watts."

[8.] In this, we think the Court was in error. The Statute of Limitations may be pleaded by the person in whose direct favor it operates, and by all those claiming *under* him; and, according to our understanding of the law, by none else. Even those in whose direct favor the Statute operates, are not bound to plead it; they may waive it. How, then, can strangers get the right to plead it.

The words of the Statute, however, do not give the benefit of the bar to strangers. They give it to the party who can say that the cause of action has not risen against *him*, at any time within four years.

[9.] In this case, the defendant's Counsel "proposed to examine the defendant on the merit of the case, not touched upon by the direct examination. Plaintiff objected, and insisted that the cross-examination must be confined to the subject-matter of the direct examination. The Court overruled the objection of plaintiff, and allowed the examination to proceed."

We think the Court was right. There is certainly doubt as to what is the rule in such cases; but the decision of the Court seems to have the support of the English decisions. (*R. vs. Brook*, 2 *Stark. R.* 472. *Morgan vs. Brydges*, *Id.* 314. 1 *Stark. Ev.* 161. 1 *Phil. Ev.* 274. 1 *Greenlf. Ev.* §445.)

And those decisions are, in general, better evidence of what the law of Georgia is, than are any other decisions, except those made by the Courts of Georgia; and the decisions

of these latter Courts have, we think, agreed with the English decisions.

No. 85.—JAMES P. PERDUE, Clerk, &c. plaintiff in error, vs. WILLIAM J. ELLIS, defendant in error.

[1.] The General Assembly have the right, should the public good require it, and public opinion demand it, to pass a law to restrict or even suppress the internal traffic in spirits; and this power may be delegated to a municipal corporation, to be exercised within their corporate limits.

[2.] By the second section of the amended charter of 1854, the Mayor and Council of the City of Griffin "have full power and authority to pass any by-law, regulation or ordinance, that shall appear to them necessary and proper, for the security, welfare and interest of said city, or for preserving the peace, health, good order and government of the same." And the seventh section of the same charter *provides*, "that the Mayor and Council shall have power to license persons to retail, and sell by retail, spirituous liquors, within the said city, according to the ordinances thereof; and that no person or persons shall sell, by retail, any spirituous liquors within the same, without first obtaining such license": *Held*, that an ordinance prescribing $500 as the fee for a retail license, was constitutional and valid.

Mandamus. In Spalding Superior Court. Heard and decided by Judge STARKE, April 28th, 1855.

The petition in this case set forth, that by the charter of the City of Griffin, it is provided that the Mayor and Council shall have power to license persons to retail and sell, by retail, spirituous liquors in said city; and also, to levy a tax of not exceeding fifty per cent. over the State tax, on all persons, professions and property within the corporate limits of said city, subject to taxation by the laws of the State.

That the said council have passed an ordinance requiring all retailers of spirituous liquors, in the City of Griffin, to pay a license fee of $500 for retailing; that the petitioner is a

poor man and unable to pay the required fee; that the petitioner, in April, 1855, went to James P. Perdue, the Clerk and Treasurer of said Council, and offered to give bond and security, according to the requirements of said charter, to keep an orderly house, and proposed to take the prescribed oath, and to pay the sum of fifty dollars as a license fee, and that the said Clerk refused to issue the license. The defendant filed his answer, admitting the main facts set forth in the petition.

On hearing the return in the case, the Court "adjudged that a peremptory mandamus do issue, commanding the respondent, on the payment of fifty dollars and the usual fees by the petitioner, and on his complying with the other regulations of the city ordinances, in regard to such matters, to issue to the petitioner a license to retail according to his application—it being here adjudged that that part of the city ordinance fixing the price of license at $500, is null and void," &c.

To which decision and judgment of the Court, Counsel for respondent excepted.

ALFORD & MOORE, for plaintiff in error.

MCCUNE; H. & G. J. GREEN, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

The record does not disclose, nor can we very readily understand, upon what principle our brother STARKE ordered a peremptory mandamus to issue, commanding the Clerk of the Council to grant a license upon the payment of fifty dollars. If this was the sum formerly paid, the ordinance requiring it was repealed, and a fee of $500 substituted in its place. The price, therefore, was $500, or it was nothing. The fact that $50 is the penalty prescribed for retailing without license, both by the State law and the city ordinance, is no reason, of course, why the payment of that sum, in advance,

should entitle the applicant to a retail-license. And upon this ground, alone, the plaintiff in error might claim a reversal of the judgment below.

[1.] But not to rest the decision of so important a question upon such narrow ground, we will consider the case as it has been discussed. It is one, undoubtedly, of the utmost magnitude.

The question involved is one of *power* and not of *expediency*. The former is for the Courts, while the latter belongs to another and more appropriate forum—the ballot-box.

Has the General Assembly of Georgia the right, should the public good require it, and public opinion demand it, to pass a law to restrict or even suppress the traffic in spirits? Have they the power to delegate this authority to a municipal corporation, to be exercised within its limits? And has this privilege been conferred upon the City of Griffin? These are the points to be adjudicated.

1. By the Constitution of 1798, it is declared, that "the General Assembly shall have power to make *all* laws and ordinances which they shall deem necessary and proper, for the good of the State, and which shall not be repugnant to the Constitution." (*Cobb's Digest*, 1115.)

It is not pretended that such an Act would violate any provision of our State Constitution. Would it impair the Constitution of the United States—any law made in pursuance thereof, or any national treaty? Whatever doubts may have existed in *eighteen hundred and thirty-nine*, or before or since, here or elsewhere, upon this subject, it is now no longer an open question.

The License Laws of Massachusetts, Rhode Island and New Hampshire, were brought before the Supreme Court at Washington, at its January Term, 1847. They were ably and fully argued by Mr. Webster, Mr. Choate and many of the leading lawyers of the union, and it was unanimously decided, that the Acts of these several States were not inconsistent with any of the provisions of the Federal Constitution or Statutes of Congress, under it. (5 *Howard's S. C.*

Rep. 504.) Six of the Justices gave separate opinions, each for himself.

Chief Justice *Taney*, said: "These laws, restricting the domestic traffic, may discourage imports and diminish the price which ardent spirits would otherwise bring; still, the State is not bound to abstain from the passage of any law which it may deem necessary or advisable to guard the health and morals of its citizens. And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice and debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or *from prohibiting* it altogether. Of the wisdom of this policy, it is not my province or purpose to speak. Upon that subject, each State must decide for itself."

Said Mr. Justice *McLean*: "In all matters of government, and especially of police, a wide discretion is necessary. It is not susceptible of any exact limitation, but must be exercised under the changing exigencies of society. In the progress of population, of wealth and of civilization, new and vicious indulgences spring up, which require restraints that can only be imposed by the legislative power. And when this power is exerted, how far it shall be carried, and when it shall cease, must mainly depend upon the evil to be remedied. It is clear that the law of a State is not rendered unconstitutional by an incidental reduction of importation. And especially is this not the case, when the State regulation has a salutary tendence on society, and is founded on the highest moral considerations."

Said Mr. Justice *Catron*, "I admit as inevitable, that if the State has the power of restraint, by license, to *any extent*, she has the discretionary power to judge of its limit; and may go to the length of prohibiting sales altogether, if such be her policy. And if the Court cannot interfere in the case before us," (and he admitted it could not,) "so, neither could we interfere in the extreme case of entire exclusion, except to protect imports belonging to *foreign* commerce, as already

defined." (That is, while it remained in the hands of the importer, for sale, in the original bale, package or vessel in which it was imported. (*Brown vs. The State of Maryland*, 12 *Wheaton*, 419.) "And the reasons," continued Mr. Justice *Catron*, "are obvious. We have no power to inquire into abuses, if such there be, inflicted by State authority on the inhabitants of the State, unless such abuses are repugnant to the Constitution, laws or treaties of the United States."

Said Mr. Justice *Woodbury*, "From the first settlement of this country, and in most other nations, ancient or modern, civilized or savage, it has been found useful to discountenance excesses in the use of intoxicating liquor. And without entering into the question here, whether legislation may not, in this as other matters, become, at times, intemperate, and re-act injudiously to the statutory objects sought to be promoted, it is enough to say, under the general aspect of it, that the legislation here is neither novel nor extraordinary—nor, apparently, designed to promote other objects than physical, moral and social improvement. On the contrary, its tendency is, clearly, to reduce family expenditures, secure health, lessen pauperism and crime, and coöperate with, rather than counteract, the apparent policy of the General Government itself, in respect to the disuse of ardent spirit. They aim, then, at a right object; they are calculated to promote it; they are adapted to no other; and no other or sinister, or improper view can, therefore, either with delicacy or truth, be imputed to these acts."

Finally, Mr. Justice *Grier* said: "It is not necessary, for the sake of justifying the State legislation now under consideration, to array the appalling statistics of misery, pauperism and crime, which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the States, is alone competent to the correction of these great evils; and all measures of restraint or *prohibition* necessary to effect the purpose, are within the scope of that authority. There is no conflict of power, or of legislation, as between the States and the United States. Each is acting within its

sphere, and for the public good; and if a loss of revenue should accrue to the United States, from the diminished consumption of ardent spirits, she will be the gainer a thousand fold, in the health, wealth and happiness of the people."

Thus, it will be perceived, that this high tribunal, whose peculiar office it is to protect the Constitution of the United States from all encroachments, and which has manifested, hitherto, no reluctance in the performance of this duty, hold, *nemine contradicente;* that it is competent for a State, in the exercise of its reserved rights and acknowledged jurisdiction, to pass any law which it may deem necessary and advisable to guard the health or morals of its citizens, notwithstanding such law may "discourage importations, or lessen the revenue of the general government;" and that such laws would be entirely defensible, although prohibiting sales, partially or entirely, within the limits of the State.

We have nothing further to add, either by way of argument or authority, to enforce the doctrines of this thorough *States Rights* decision, especially as the proposition has not been seriously controverted by Counsel, that the power of the *States* to regulate the domestic traffic in spirits, is complete, unqualified and exclusive.

2. We are next to consider, whether this right can be delegated to a municipal corporation, to be exercised within its corporate limits.

I need not adduce authorities to show that powers of this and the like character, have been exercised by municipal communities ever since their institution. Indeed, the original idea seems to have been that police regulations belonged, inherently, to those local bodies. The Colonial Act of 1757, regulating taverns, punch houses and retailers of spirituous liquors, is not contained in any of the Digests; but the Act of 1791, after making provision for the State at large, has this section, "*Provided, always*, that the corporation of the city of Savannah and Augusta shall have the sole regulation and power of governing and directing taverns, and granting

licenses within their several jurisdictions." (*Cobb's Digest*, 1037–8.)

So, also, in the Act of 1809. which was the first to separate the retail proper from tavern licenses, and to fix five dollars as the fee for the privilege of vending it is, *Provided*, "That nothing in the Act shall be construed to control the rates which now are or may be established by the corporations of Savannah and Augusta, or *any other incorporated town in this State.*" (*Ib.*)

Again, in the XXVIIth section of the 10th division of the Penal Code, where retailing spirits without license subjects the offender to a fine of $50, *incorporated towns or cities* are exempted from the operation of the Act, where, by law, authority to grant licenses is vested in the corporate authorities of such towns or cities. (*Cobb's Digest*, 818.)

Seeing that the power in question has been exercised by the express sanction of the Legislature for sixty-four years at least, without complaint or objection, it may well be insisted that it is legitimated by the habitude of such a length of time, being almost coëval with the State Government itself. And while it may be true, that a bad precedent, suffered to pass *sub silentio*, cannot be set up to justify an abuse in which it originated, especially where the question is one of constitutional law, touching the political organization of the State; still, one may well pause and hesitate to subvert a veteran practice, not only venerable for its antiquity, but one which has worked so harmoniously and well.

The Act of 1791, recognizing the right of Savannah and Augusta to have the sole control over licenses within their several jurisdictions, had been in force seven years when the Constitution of 1798 was adopted. And after being extended, by the Act of 1809, to all other incorporated towns within the State, has remained upon the Statute Book, with immaterial modifications, from that time to this. And now, after the lapse of nearly three-score years and ten, it is first discovered that this whole system of legislation, embracing not only li-

censes, but innumerable kindred topics, is unconstitutional and void.

We concede that this long acquiescence may not, of itself, prove this species of legislation valid; still, its repugnance or incompatibility should be as clear and certain as that the parts are less than the whole, to justify this or any other Court, under such circumstances, to impeach its constitutionality. For let it be announced as the law of the land, that all the police regulations of all the incorporated towns in the State are without authority—that these municipalities have no power, even under a direct grant from the Legislature, to enact health, harbor and quarantine ordinances—to direct the safe-keeping of gunpowder—to institute patrols—to punish petty offences, and to exercise all other powers of a similar character, and a panic would be justly created throughout the State. Sir *James McIntosh* attributes the revival of order and security, industry, trade and the arts, in Europe, and indeed, the civilization of the modern world, in a good degree, to the institution of municipal communities, who are invested with the privilege of managing their own local interests, under the protection of the parent State. And Chancellor *Kent*, *M. De Tocqueville*, and every other philosophical observer, ascribe to the establishment of towns, constituting as they do, small independent republics, not only the high moral and social condition of our people, but even the principal of the life of American liberty, as it exists in this country.

While, therefore, we esteem the duty of preserving the Constitution—Federal and State—intact, as paramount to every other consideration, and should not shrink from applying the appropriate corrective, did we believe that either had been violated; still, seeing, as we do, that the powers delegated to our towns and cities, are exercised so beneficially for the good order, peace, security and welfare of those small communities, we must be convinced, beyond a reasonable doubt, that the Legislature has transcended its legitimate authority, before we could consent to crush, with iron hand, these embryo

republics. The consequences which would ensue, are too tremendous for evil, to be hastily hazarded.

In the great case of *The City of London vs. Wood*, (12 *Modern*, 669,) the Court of King's Bench, (Lord *Holt* presiding,) say, "we must consider the City of London, as all other great towns are to be considered, a community that have a *legislative power* intrusted to them for their better government; and can make laws to bind the property of those who live within that city or precinct, and also of all the strangers, whatsoever, that come within the limits of their jurisdiction; and it was necessary and convenient they should have such power for the support of their government. And it is so in all countries and forms of Government whatever, whether Monarchy, Aristocracy or Democracy, or whatever form of Government it be, for the supreme jurisdiction cannot have leisure to inspect into the small matters that concern the whole order and regulation of matters within that society or community, as they that are members of it shall. *Hobart*, 221, says that all corporations, as such, have power to make laws and ordinances, and need not special words in their patents to enable them thereunto."

The point in issue, in the second branch of this discussion, was directly made in the case of *The Commonwealth vs. Duquet*, (2 *Yeates*, 493,) one of the positions laid down by Messrs. Rawle & Du Ponceau, Counsel for the defendant was, that the Legislature of Pennsylvania could not confer upon the corporation of the City of Philadelphia, the power to pass ordinances to prevent the erection of wooden buildings in certain parts of the city, as they might judge proper, but that such power must be exercised by the Legislature, directly. But the Court held the law to be constitutional, and the ordinance founded thereon good.

And it is a singular fact, that the modern cases, both in Pennsylvania and elsewhere, which maintain that the Legislature alone is competent to make laws, and that it cannot ordain a new or different power for that purpose, thereby creating an *imperium in imperio*, admit not only that the

case just cited was correctly decided, but concede that all municipal corporations, clothed with the power of making by-laws for the conduct of their concerns, and the government of their members, are free from this constitutional objection. The distinction taken is this: that by-laws are no more than a species of contract between the individual members of the corporation; and in the case of municipal corporations, may be extended to a stranger who comes, voluntarily, within the jurisdiction, upon the principle that his coming is equivalent to an assent to be bound by the local law of the place. Whether there be any substantial difference between the case of municipal corporations enacting by-laws or ordinances, and the delegation of power, by the Legislature, to a majority of a county or township, to decide whether licenses shall be granted within their several limits, it is unnecessary for us to express an opinion. Suffice it to say, that while acts for the latter purpose have been set aside, by some Courts, as nugatory, the former has never been questioned by any legal tribunal in England or America.

6. We come now to the last point to be considered—and that is, has the City of Griffin been vested with authority to pass the ordinance in question?

The second section of the amended charter of 1854, declares, that "the Mayor and Council of the City of Griffin, shall have full power and authority to pass every by-law, regulation or ordinance, that shall appear to them necessary and proper for the security, welfare and interest of said city; or for preserving the peace, health, order and good government of the same." (*Pamphlet, p.* 6.)

And the seventh section of the same charter provides: that the Mayor and Council shall have power to license persons to retail, and sell by retail, spirituous liquors within the said city, according to the ordinances thereof. And no person or persons shall sell, by retail, any spirituous liquors within the same, without first obtaining such license." (*Ib.* 7.)

The single inquiry then is, not whether the power in dispute does not reside, inherently, in all corporations, and is

not recognized by the Act of 1809, to exist in all incorporated towns in this State, but whether the right has not been directly delegated to the City of Griffin, by the amended charter of 1854?

And can language be plainer or broader than the words of that charter? Is it not manifest that the Legislature intended to intrust this whole matter of license to the city authorities, within their corporate limits? Have they expressed or intimated any purpose to restrict the comprehensive grant which they made?

It is contended that the price of the license is limited by that clause in the 5th section, which allows the city authorities to levy a tax, not exceeding 50 per cent. on the State tax, "on all persons, professions and property," within the City of Griffin. The response is three-fold. 1st. This is not a tax. 2dly. It does not come within the terms, "persons, professions and property;" and 3dly, if it did, the words, "persons, professions and property," evidently refer to persons, professions and property subject, by law, to State taxes *within the city*. But the State having conferred on the city the right to grant licenses, has thereby ousted herself of this right within the corporate limits. And consequently, there is no State tax, as to licenses, upon which the 50 per cent. could be assessed, under this clause. 50 per cent. can be levied on the amount of taxes paid on all property, real and personal, to the State, situate within the city; also, on the poll-tax, the professional tax paid by lawyers, &c. The *corpus* of the tax, under the public law, goes to the State; the per centage, under the by-law, to the city. But there is nothing going to the State on licenses in Griffin; and therefore, as we have said before, there is nothing upon which to levy the per centage.

Again, it is insisted that a corporation cannot impose a tax beyond that levied by the State, upon the citizens generally. And *Grant, on Corporations* (*Chapter Bye-laws,*) is relied on to sustain this principle. The text is this: "If, by a public general Statute, *applicable to every subject of the*

Realm of England, a penalty of 5*s.* is imposed for a certain description of offences, and a corporation having rights and powers of a territorial government, pass a by-law affixing the penalty of £5 to the commission of every such offence within their boundaries, such bye-law is said to be bad." (*Page* 88.)

In *Calder Navigation Company vs. Pillong*, (14 *M. & W.* 90, *Per Lord Kenyon*, *C. J.* 7 *T. R.* 748,) this doctrine was sustained. But *Butcher's Company vs. Morey*, (1 *H. Black.* 370,) *Butcher's Company vs. Bullock*, (3 *B. & Pul.* 434,) *Pierce vs. Barham*, (*Cowper*, 270,) were cases of by-laws, surviving against the principle in the text, and yet held to be valid. Upon authority, then, the doctrine is doubtful. But waiving this reply, there is no conflict of the character contemplated in the present case.

The principle is, that where a Statute imposes a penalty or exacts a duty from *all* the cititizens of the State, that it is not competent for a corporation to increase that penalty or add to that duty. If the Act of 1809, and subsequent Statutes, making five dollars the fee for a license, operated upon the people of Griffin, the rule would apply; but they do not. The State has seen fit to withdraw her general jurisdiction over this portion of her people, and substituted, as to them, and as to license, the local legislation in lieu of her own. There is, therefore, no repugnance; and such has been the uniform construction, by our Courts, for more than a half century. We have seen, that since 1791, incorporated towns and cities have been excepted from the general operation of the State Laws, as to the subject of licensing; and that the incorporated towns have regulated the license without regard to the State Law, and have always made the fee higher; and this is right, in itself. The business is more profitable in towns, and should pay for the privilege of vending, in proportion to their profits. In an adjoining State, hotels in cities not larger than Griffin, are willing to purchase a license at $1000, and even $1500; and if I have not been misinformed, receipts at the bar of one of the public houses in this State, located in a city less than the largest size, approximated to

$80,000 in some thirteen or fourteen months. I will not vouch for the accuracy of the statement.

But we need not press this point further; for our brother STARKE, in exacting a fee of fifty dollars of Mr. Ellis, the applicant, not only ignored this proposition, but also the other, which we have heretofore examined, as to the *taxing clause* in the charter; and, we think, rightly.

Again, it is argued that this ordinance is in restraint of trade; and it is stated in the argument, that the decision of the Circuit Court, declaring the by-law a nullity, was mainly placed upon this ground.

The farthest the rule has gone upon this subject is, that by-laws, in restraint of trade, will not be *favored*. (*Grant on Corporations*, 91.) But is not every system of licenses to retail spirits, to some extent, a restraint upon trade? Does not a limitation of five dollars even, lessen the sale of the article? Even the retailer is forbidden to keep a drunken or disorderly house. If this prohibition be observed, will not a less quantity of liquor be sold? But whoever thought of impuning the validity of our license laws on that account? Do not laws which forbid sales and the transportation of freight trains upon the Sabbath, have a tendency to restrain an indiscriminate traffic? Is the law which forbids the sale of spirits to slaves bad? Yet, *none* restrains trade more. This, and numerous other salutary enactments, are a dead letter upon the Statute Book, for want of public prosecutors, and will remain so until the penalty is increased, and one half is given to the informer; and still, more legislation is clamorously demanded, and the State vilified in newspapers and public lectures for not enacting it! I too, was one zealous without judgment, upon this subject; I can, therefore, the more readily excuse others. The provision in the Penal Code against selling the flesh of diseased animals and other unwholesome provisions, is in restraint of trade, and yet subjects the offender to fine or imprisonment, or both, at the discretion of the Court. So, it is criminal to sell adulterated or pernicious liquors, knowing them to be so. How few of

any other sort are vended! ignorantly, of course. Hence, the main cause of such speedy mortality from modern tapping.

To buy or sell a vote subjects the parties to incarceration within the walls of the Penitentiary. How restrictive this policy! To purchase of a slave, without written permit, cotton, tobacco, wheat, rye, oats, corn, rice or poultry, or any other article except such as are usually manufactured or vended by negroes, is a misdemeanor; and a fine of $1000 is imposed upon pedlars and other itinerant traders who deal with slaves, without the permission or presence of their owners. These regulations not only restrain, but extirpate a most lucrative traffic. As far back as 1808, it was made unlawful to sell, or cause to be sold, any wine, cider, beer, whiskey, gin, rum, brandy, or any other intoxicating liquors, within one mile of any meeting-house or other place of public worship, during the time appropriated to such worship. (*Cobb's Digest*, 817.) Interpreting this Act to apply to country churches, we would ask, are not town and city congregations—aye, and schools too, especially female seminaries, equally entitled to immunity from this annoyance?

But it may be replied, that all the cases put, differ from the one at bar in this: that in every instance enumerated, the trade is condemned by the Legislature; whereas, the retail traffic is legalized and approbated by the public law. That it may be legalized by taking out a license, we readily concede. And so it may be in Griffin. But that it is *approbated*, we cannot admit. It is tolerated, just for the same reason that polygamy was suffered by the only wise Law-giver, amongst His ancient people. "But it was not so from the beginning:" nor did it continue under the new and better dispensation.

We deny that the State of Georgia has ever looked to licenses on retail, as a revenue measure. The pittance paid for the privilege of vending liquors, is too small to warrant such a conclusion.

We deny, too, that her position is antagonistic to that of the City of Griffin, touching this traffic. Will it be alleged,

that it is the purpose of Georgia "to debauch the public morals—to encourage a lavish waste of property, and to multiply crime?" And that, too, from mercenary motives! Shall it be pretended that it is her settled policy to make wives widows, and children orphans, and to wage a war with all the best interests of society? We repudiate, in her behalf, an imputation as unjust as it is unfounded. The provision in the Penal Code, that drunkenness shall not be an excuse for any crime or misdemeanor, negatives the imputation, that the State not only winks at, but approves of the traffic.

She is wise enough to see, that the usages of centuries are not to be uprooted in a day. Her counsellors have profited by the lessons of wisdom drawn from the experience of the past. They have learned, that the imposition of high duties does not destroy the appetite for spirits; and that no vigilance, on the part of officers, or severity of the laws, can eradicate a custom so long indulged and universally practiced; and that the real effect of all ultra measures have been to continue the supply through illicit channels; and thus, to superadd the meanness of concealment to the vice of drunkenness. They have studied the history and results of a premature effort, made by the British Government as early as 1736, to put a total stop to the further use of spirituous liquors, except for medicinal, manufacturing and mechanical purposes.

During the latter part of the reign of *George I.* and the earliest part of that of *George II.* gin-drinking had become exceedingly prevalent. And the evils resulting from the multiplication of grog-shops, were denounced from the pulpit and in the presentments of Grand Juries, as pregnant with the most destructive consequences to the health and morals of the community. At length, Ministers determined to repress the mischief effectually. They passed an Act, the preamble of which recites, that "whereas, the drinking of spirituous liquors, or *strong water*, is become very common, and especially among the lower and inferior rank, the constant and excessive use of which tends greatly to the destruction of

their health, rendering them unfit for useful labor and business, debauching their morals, and inciting them to perpetrate all vices. And the ill consequences of the excessive use of such liquors, are not confined to the present generation, but extend to future ages, and tend to the destruction and ruin of this Kingdom."

A duty of *twenty shillings* a gallon was laid on spirits, exclusive of a heavy license duty on retailers. Extraordinary encouragements were held out to informers; and a fine of £100 was ordered to be rigorously exacted from those who were engaged in it even though inadvertence should vend the smallest quantity of spirits which had not paid the full duty.

Here was a Statute sufficiently stringent to satisfy the most clamorous friend of legislation; and that, too, adopted by a *monarchy*, which depends upon *force*, rather than *public opinion*, for the execution of its laws. But instead of the anticipated effects, it produced those directly opposite. The respectable and conscientious dealers withdrew from a trade proscribed by Parliament; so that the business fell almost entirely into the hands of the lowest and most profligate characters, who, as they had nothing to lose, either in character or estate, were not deterred, by penalties, from breaking through all the provisions of the Act. The masses, say the annalists of that period, having, in this as in all similar cases, espoused the cause of the contraband dealers; (and no wonder that they should, feeling, as they do, that all such legislation operates practically, if not so intended, as an odious discrimination against them;) the public officers were openly assaulted in the streets of London and other great towns; informers were hunted down like wild beasts; and drunkenness, disorders and crimes increased with a frightful rapidity. "Within two years of the passing of the Act," says *Tindal*, "it became *odious and contemptible*; and policy, as well as humanity, forced the commissioners of excise to mitigate the

penalties." (*Continuation of Rapin, Vol.* 8, *p.* 368, *Ed.* 1759.)

The same historian mentions, (*Ib. p.* 390,) that during the two years in question, no fewer than 12.000 persons were convicted for offences connected with the sale of ardent spirits. But no exertion on the part of Magistrates and Ministers could stem the popular current. And according to a statement made by the Earl of Chelmandeley, in the House of Lords, (*Timberland's Debates in the House of Lords, Vol.* 8, *p.* 388,) it appears that at the very moment when the sale of spirits was forbidden as illegal, and every possible exertion made to prevent and suppress it, upwards of *seven millions* of gallons were annually consumed in the City of London alone, and parts immediately adjacent thereto. Finally, Government gave up the unequal struggle, and in 1742, repealed the high prohibitory duties, notwithstanding the vehement opposition of the Bishops and many of the Peers, who exhausted, we are told, all their rhetoric in depicting the ruinous consequences that would follow.

To these declarations it was unanswerably replied, that whatever the evils of the practice might be, it was impossible to repress them by prohibitory enactments, until there was laid, broad and deep, in the mental and moral improvement of the people, a foundation to sustain them; and that any premature attempt to do so, would be productive of far greater evils than had ever resulted, or could be expected to result, from the greatest abuse of spirits.

Similar efforts were made, at a later day, to arrest the progress of demoralization in Ireland and Scotland, resulting from the same cause, which ended equally unsuccessful and unsatisfactorily.

[2.] Now, the State of Georgia, instead of countenancing an indiscriminate traffic, exacts a fee of five dollars, for permission to pursue this business in the State at large, and exacting a bond of five hundred dollars to keep an orderly house, (*one half of the penalty of which should, when recovered, go to the informer, seeing that there is not public spirit*

enough, even amongst the professed friends of good order, to enforce its observance,) at the same time, giving to the incorporated towns a discretionary power over this subject, within their respective limits. Her next movement will be, and that speedily, as we humbly trust, to extend this control and supervision to the Inferior Courts of the several counties—a measure most devoutly desired by all the prudent and practical men of the country, who have reflected most profoundly upon this subject.

Finally, it is assumed that while, by the amended charter, the corporation of Griffin may *regulate*, it cannot *inhibit* the traffic; and that in the case of Mr. Ellis, at least, the fee of five hundred dollars amounts to prohibition.

The ordinance does not purport, upon its face, to be prohibitory. It is not so, in fact. Judge STARKE required the petitioner to tender fifty dollars as a license fee; what difference is there between a law which makes the license fee ten times as large as the State license, and one which is ten times larger than that? It is only in the degree of prohibition, and not in the principle. All are prohibitory, and each would cut off some—none of them all. And it is the small dealers that perpetrate the most mischief, because it is that class that mostly corrupt our slave population.

Admitting, then, that the present ordinance is more prohibitory than that which it superceded, and which the presiding Judge proposed to enforce, does this render the one void and the other valid? And how much of prohibition must a law contain, more or less, to vitiate it? We should like to have an intelligible rule upon this point. What rule of arithmetic will the Courts apply to this subject? The license fee varies in most of our towns, and in all exceeds that paid to the State. Which of these are good and which bad? We desire a distinct line of demarcation drawn. Ought not the sum to vary according to the profits of the business and other circumstances? Ought a bar, yielding $25.000 per annum, to pay no more than a cross-road grog-shop? Can this Court —can any Court—calculate and determine where *regulation*

ends and *prohibition* begins? What means have Courts to ascertain the practical effects of one or another ordinance relative to this subject, both prohibitory, but prohibitory in different degrees? May not this power be wisely left to each local government?

Grant, however, that the present ordinance, in its purpose, end and operation, if not in form, is substantially and practically prohibitory; still, we should hold that the Mayor and Council have not transcended the powers conferred upon them by their charter. And if they believed that the means of social improvement, and the success of their institutions of religion and learning depended, in a measure, upon the stringent exercise of the authority thus delegated, who shall gainsay it?

Upon glancing, as we have done, cursorily over the code of this young but rapidly rising city, we see much to admire. And with the knowledge, that if the trust bestowed by the parent State has been abused in this instance, the corrective is with the local constituency, we deem it our duty to reverse the judgment of the Circuit Court, which denied that the Mayor and Council of the City of Griffin had the right to pass the ordinance now under consideration.

No. 86.—JACOB CLARK, for use, &c. plaintiff in error, *vs.* JEREMIAH B. TUGGLE, defendant in error.

[1.] The general rule is, that two suits between the same parties, for the same subject-matter, cannot be prosecuted at the same time; and there is no reason why a proceeding by attachment, and another by bail writ, sued out at the same time, and between the same parties, and on the same subject-matter, should form an exception to the rule.

[2.] Such a proceeding cannot, by construction, properly be brought within the provisions of our Statute, authorizing the suing out of attachments *pendente lite*.

Attachment, in Macon Superior Court. Tried before Judge POWERS, April Term, 1855.

On the 31st day of July, 1854, A. B. Ross, as agent for plaintiff in error, sued out an attachment against the defendant; and at the same time, commenced an action of debt against the defendant, in which he required bail. The two processes were placed in the hands of the Sheriff, on the same day. On the 1st day of August, 1854, the Sheriff levied the attachment on certain property of the defendant; and on the 5th day of the same month, he arrested the defendant under the bail process. The two cases were returned to Court, and the plaintiff obtained a verdict in the bail case. When the attachment was called by the Court, the defendant moved to dismiss it.

The Court sustained the motion, and plaintiff excepted.

COOK & MONTFORT, for plaintiff in error.

MILLER & HALL, for defendant.

By the Court.—STARNES, J. delivering the opinion.

[1.] We recognize the general rule, that two suits between the same parties, for the same subject-matter, cannot be prosecuted at the same time; and the exception as to mortgages, where the suit or action for the foreclosure and that for the debt, to secure which the mortgage was executed, may be prosecuted at the same time.

No reason occurs to us why an exception should be made of a proceeding by bail process and by attachment, on the same subject-matter, and between the same parties, at the same time prosecuted.

The attachment is an extraordinary proceeding, in derogation of Common Law; and our Statutes authorizing the remedy, have been always subjected to strict construction in our Courts. This would seem to be a sufficient reason, if there

were none other, why the exception should not be made in this case.

It may be added, that our Legislature has given its sanction to this view of the subject, by passing the Act which authorizes the issuing of attachments *pendente lite*. That Statute may be regarded as a legislative declaration, that special legislative action was necessary in order to authorize a plaintiff to proceed by attachment, when he had another action pending against the defendant on the same subject-matter.

[2.] It has been argued, that the proceeding in this case, is in the nature of an attachment sued out *pendente lite;* but this is not correct. Both the processes bear date on the same day, and the attachment was served some five days before the bail writ.

It has been suggested, too, that though that be so, yet, the case, perhaps, may be placed within the reason and spirit of the Act.

The reason which, as we have already said, requires our Attachment Laws to be strictly construed, here interposes and forbids that this free construction should be given to the Act.

It was easy for the Legislature to have provided for such a state of facts, when they passed the law; and not having done so, we do not feel authorized to strain the construction of an Act which provides this extraordinary remedy, and is in derogation of Common Law.

Let the judgment be affirmed.

No. 87.—JAMES W. ARMSTRONG, plaintiff in error, vs. THE OGLETHORPE BRIDGE & TURNPIKE COMPANY, defendant in error.

[1.] Appeals under the Act of 1852, "to incorporate the Oglethorpe Bridge & Turnpike Company," &c. are to be entered by the next term of the Court coming after the date of the award appealed from.

Award, in Dooly Superior Court. Tried before Judge POWERS, April Term, 1855.

This was an appeal taken by the Oglethorpe Bridge & Turnpike Company, from award rendered by three commissioners, to-wit: D. S. Harrison, W. H. Byrum and W. Beverly, selected by the parties and the Inferior Court of Dooly County, assessing damages for land and a ferry belonging to James W. Armstrong, and appropriated to their use by said company. The commissioners assessed $6.000 as the damages, on the 17th day of February, 1855. The company entered an appeal, under their charter, within four days, to the Superior Court of said county, but gave no security upon their bond, and there was no affidavit of inability to give security, by any of the officers of the company.

When the cause was announced for trial, Counsel for Armstrong, upon these grounds, moved to dismiss the appeal.

Counsel for the company resisted the motion, and moved the Court to be permitted to perfect the appeal, by the president of the company filing an affidavit, in substance, "that the company was unable, from its poverty, to give security; that they had a good cause of appeal, and that the affidavit would have been made when the appeal was entered, but from the decision of this Court in said case, at a former term, deponent was led to believe, and did believe, that no security was necessary."

It was admitted that the same parties had been before the Court on an appeal from an award rendered in 1854, which, however, did not affect the present case, the appeal in the

as a witness, depends, as in every other case, upon the question of interest in the event of the suit.

[6.] As a general rule, at Common Law, in an action of assumpsit, against two defendants upon a joint contract, judgment cannot be given against one defendant without the other.

[7.] Under the laws of this State, in all actions where two or more defendants are joined, and it shall be made to appear, on the trial, that a portion of them are not liable, and ought not to have been joined in the action, the suit shall not abate or be quashed on that account: but the action may thereafter proceed against the other defendant or defendants.

[8.] One of two dendants. in an action *ex contractu*, who has been defaulted, or against whom a verdict has been rendered, and he has failed or refused to appeal, is a competent witness for the others—provided he be otherwise disinterested, and there is no policy of the law which will exclude him, aside from his interest.

Assumpsit, in Spalding Superior Court. Tried before Judge STARKE, November Term, 1854.

This was an action of assumpsit, brought by Archibald M. Nall, against Addison A. Wooten and Hugh P. Kirpatrick, upon the following promissory notes:

"GRIFFIN, February 16th, 1852.

One day after date, we or either of us, promise to pay A. M. Nall or bearer, Nine Hundred and Ninety $\frac{70}{100}$ Dollars for value received. A. A. WOOTEN."

"GRIFFIN, February 16th, 1852.

By the 25th day of May next, we or either of us, promise to pay A. M. Nall or bearer, One Thousand and Seven $\frac{42}{100}$ Dollars for value received. A. A. WOOTEN."

The declaration contained three counts. In the first count it was "alleged that the plaintiff sold a stock of goods to Wooten, for the use and benefit of Wooten & Kirkpatrick, that it was the understanding and agreement between plaintiff and Wooten, and assented to by Kirkpatrick, that [illegible] to sign the notes, which Kirkpatrick afterwards re

though entered at the first term coming after the award appealed from, was not entered until the end of six months after the award had been made. The Act, too, governing that case, provided that appeals might be transmitted to the Clerk. No such provision is contained in this Act. Is it certain, therefore, that the *Clerk* can receive an appeal under this Act? Is it not the *Court* that, under this Act, is to receive an appeal? (9 *Ga.* 406.)

Be that as it may, according to the *decision* in *The State vs. Dean*, an appeal, at the first term, is good. And the force of this decision is not to be destroyed by an *obiter* intimation (it is no more) of the Court, that such appeals are to be made within a reasonable time, and that *four days* after the award is a reasonable time.

We think the decision of the Court below ought to be affirmed.

No. 88.—WOOTEN & Co, plaintiffs in error, *vs.* ARCHIBALD M. NALL, defendant in error.

[1.] The production of papers upon notice, does not make them evidence in the cause, unless the party calling for them inspects them, so as to become acquainted with their contents; in which case, they are admitted as evidence for both parties and on all subsequent trials.

[2.] Receipts and other papers, are admitted in evidence upon no other proof than the presumption of their fairness, founded upon the experience of human conduct, in the due course of trade and transaction of business.

[3.] The mere fact that the name of a witness appears as a party upon the record, is not sufficient to exclude him if it appears, affirmatively, that he has no interest in the suit.

[4.] If the witness be a party to the issue to be tried, he shall not be examined as a witness.

[5.] If not a party to the issue to be tried, his competency or incompetency,

as a witness, depends, as in every other case, upon the question of interest in the event of the suit.

[6.] As a general rule, at Common Law, in an action of assumpsit, against two defendants upon a joint contract, judgment cannot be given against one defendant without the other.

[7.] Under the laws of this State, in all actions where two or more defendants are joined, and it shall be made to appear, on the trial, that a portion of them are not liable, and ought not to have been joined in the action, the suit shall not abate or be quashed on that account; but the action may thereafter proceed against the other defendant or defendants.

[8.] One of two dendants, in an action *ex contractu*, who has been defaulted, or against whom a verdict has been rendered, and he has failed or refused to appeal, is a competent witness for the others—provided he be otherwise disinterested, and there is no policy of the law which will exclude him, aside from his interest.

Assumpsit, in Spalding Superior Court. Tried before Judge STARKE, November Term, 1854.

This was an action of assumpsit, brought by Archibald M. Nall, against Addison A. Wooten and Hugh P. Kirpatrick, upon the following promissory notes:

"GRIFFIN, February 16th, 1852.

One day after date, we or either of us, promise to pay A. M. Nall or bearer, Nine Hundred and Ninety $\frac{70}{100}$ Dollars for value received. A. A. WOOTEN."

"GRIFFIN, February 16th, 1852.

By the 25th day of May next, we or either of us, promise to pay A. M. Nall or bearer, One Thousand and Seven $\frac{42}{100}$ Dollars for value received. A. A. WOOTEN."

The declaration contained three counts. In the first count, it was "alleged that the plaintiff sold a stock of goods to Wooten, for the use and benefit of Wooten & Kirkpatrick; that it was the understanding and agreement between plaintiff and Wooten, and assented to by Kirkpatrick, that both were to sign the notes, which Kirkpatrick afterwards refused to do."

In the second count, it was alleged "that the defendants were indebted to the plaintiff, in the sum of 1.997 $\frac{82}{100}$ dollars, for goods, wares and merchandize, sold and delivered by plaintiff to the defendants"

The third count was upon an account, stated between the plaintiff and the defendants, for the sum aforesaid.

To this declaration the defendants demurred, upon the ground of duplicity; and also pleaded the general issue, and no partnership, &c.

At the first trial in the Inferior Court of said county, the Jury found a verdict for the plaintiff.

Kirkpatrick took an appeal to the Superior Court, Wooten did not appeal.

The cause came on to be tried on the appeal, at November Term, 1854, of the Superior Court of said county.

The Court over-ruled the demurrer to the declaration, and defendant excepted.

Much testimony was introduced by the plaintiff, which is not necessary here to set out.

After he closed his case, the defendant offered in evidence an instrument in writing, made by Wooten to Kirkpatrick, dated 12th day of September, 1851—produced in Court, under a notice from plaintiff, in which Wooten stated that Kirkpatrick bought of him one half of his stock of goods, and agreed that Kirkpatrick should hold the two last instalments of the purchase money, to indemnify him against his securityship for Wooten, on a note to Henly Varner.

The Court rejected the testimony, and defendant excepted.

The defendant then offered Addison A. Wooten as a witness. Plaintiff objected to the witness. The Court sustained the objection, and defendant excepted.

The defendant then proposed to pay all cost which had accrued in the case, and to deposit whatever sum of money the Court might adjudge sufficient to cover all future cost; he also proposed to release Wooten from all liability to him, arising out of the case. The Court still rejected the witness, and defendant excepted.

as a witness, depends, as in every other case, upon the question of interest in the event of the suit.

[4.] As a general rule, at Common Law, in an action of assumpsit, against two defendants upon a joint contract, judgment cannot be given against one defendant without the other.

[5.] Under the laws of this State, in all actions where two or more defendants are joined, and it shall be made to appear, on the trial, that a portion of them are not liable, and ought not to have been joined in the action, the suit shall not abate or be quashed on that account: but the action may thereafter proceed against the other defendant or defendants.

[6.] One of two dendants, in an action *ex contractu*, who has been defaulted, or against whom a verdict has been rendered, and he has failed or refused to appeal, is a competent witness for the others—provided he be otherwise disinterested, and there is no policy of the law which will exclude him, aside from his interest.

Assumpsit, in Spalding Superior Court. Tried before Judge STARKE, November Term, 1854.

This was an action of assumpsit, brought by Archibald M. Nall, against Addison A. Wooten and Hugh P. Kirpatrick, upon the following promissory notes:

"GRIFFIN, February 16th, 1852.

One day after date, we or either of us, promise to pay A. M. Nall or bearer, Nine Hundred and Ninety $\frac{70}{100}$ Dollars for value received.

A. A. WOOTEN."

"GRIFFIN, February 16th, 1852.

By the 25th day of May next, we or either of us, promise to pay A. M. Nall or bearer, One Thousand and Seven $\frac{12}{100}$ Dollars for value received.

A. A. WOOTEN."

The declaration contained three counts. In the first count it was "alleged that the plaintiff sold a stock of goods to Wooten, for the use and benefit of Wooten & Kirkpatrick, that it was the understanding and agreement between Nall and Wooten, and assented to by Kirkpatrick, that the notes, which Kirkpatrick afterwards r

ry of the goods by Nall to Wooten, or that the contract should have been reduced to writing." The Court refused to give the charge, and defendant excepted.

GREEN; FLOYD; MARTIN, for plaintiffs.

MCCUNE; HARMAN; ALFORD & MOORE, for defendant.

The Court not being unanimous, delivered their opinions *seriatim*.

By the Court.—LUMPKIN, J. delivering the opinion.

Considering the declaration as substantially a suit against Wooten & Kirkpatrick, *as co-partners*, we affirm the judgment of the Court below, in over-ruling the demurrer to the writ, upon the ground of duplicity.

[1.] It seems that Kirkpatrick had become security for Wooten, to one Henley Varner, for fifteen hundred dollars; and to indemnify Kirkpatrick against liability or loss, Wooten executed to him an instrument in writing, to the effect, that the two last instalments due to Wooten by Kirkpatrick, for one half of the stock of goods bought of Nall, the plaintiff, and amounting to upwards of eighteen hundred dollars, should be kept back by Kirkpatrick, and applied, by him, to the payment of the debt to Varner, or so much thereof as might be needed for that purpose. This paper had been produced in Court under notice to the defendants, and inspected by the plaintiff's Counsel at a former trial. Was the defendant entitled to read this document? Our learned brother ruled the evidence out, and error is assigned upon the rejection of this proof.

Mr. *Greenleaf* says—"The production of papers, upon notice, does not make them evidence in the cause, unless the party calling for them inspects them, so as to become acquainted with their contents; in which case, the English rule is, that they are admitted as evidence for both parties." (1 *Greenlf. Ev.* §568.)

And the reason assigned by the author is, that "it would give an unconscionable advantage to enable a party to pry into the affairs of his adversary, for the purpose of compelling him to furnish evidence against himself, without, at the same time, subjecting him to the risk of making whatever he inspects evidence for both parties."

With the wisdom of this rule, we have nothing to do. It is not only not uniform in the American Courts, but in the case of *Gordon vs. Secretan*, (8 *East.* 548,) it was said to have been over-ruled and denied altogether. See, also, *Sayre vs. Kitchen*, (1 *Esp. R.* 209,) *and* 2 *Evans' Pothier*, 187. The Supreme Court of Pennsylvania, in *Withers and others vs. Gillespy*, (14 *S. & R.* 10,) consider the argument against the rule to be insuperable. On the other hand, in support of the rule, we have 2 *Tidd. Pr.* 804. 2 *T. R.* 41, *and Thompson vs. Jones, and Passel vs. Godsall, the recited.* 5 *T. R.* 386. 5 *Esp. cases*, 235. 7 *Car. & Payne*, 386. 1 *Caines'*, 277. 2 *Wash. C. C. Rep.* 482, 484, (*note.*) 1 *Harring's R.* 233, 284. 4 *Shep.* (16 *Maine*) 224. 8 *Sm. and Mar.* 362, *and* 1 *Cush.* 33, (*Massachusetts.*)

Holding the rule itself, then, to be too well settled upon the authorities to be disturbed, the inquiry presents itself, did it extend to the second trial? And upon this point the books are silent. It must be decided, therefore, upon principle. What is the reason for making papers, produced under notice, and inspected by the party calling for them, evidence for his adversary? It is, says Mr. *Greenleaf*, because it would give an unconscionable advantage, to enable a party to pry into the affairs of his adversary, for the purpose of compelling him to furnish evidence against himself, without, at the same time, subjecting him to the risk of making whatever he inspects evidence for both parties.

We ask, was not this paper inspected by the plaintiff? Had he not been enabled to pry into the affairs of the defendants? Having thus acquired an advantage of which he could avail himself throughout the litigation, is it right to restrict the corresponding benefit given by the law to the de-

fendant to the *first* trial? No such limitation is suggested in the rule; we see no good reason, even if we had the authority, to impose it.

[2.] Kirkpatrick offered two receipts, both made to him by Wooten—one bearing date the 2d day of May, 1851, and the other, on the 2d day of February, 1853—each purporting to be for a part payment of the purchase-money due by Kirkpatrick to Wooten, for one half of the goods bought by Wooten of Nall. He likewise tendered in evidence a note and account due by Wooten & Nall to the Planter's Manufacturing Company, which had been taken up by Kirkpatrick and delivered to Wooten, in part payment of the debt due to him by Kirkpatrick, for the one half of the stock of goods bought of Nall; and which note and account Nall admitted had been turned over by Wooten to him, upon settlement. The whole of this testimony was rejected; and we propose to consider and dispose of it all together.

Why the latter portion of this proof, namely: the note and account, were excluded, we cannot very readily comprehend. The issue was, whether or not Kirkpatrick was a partner of Wooten, in the first purchase from Nall? Now, under any view of the transaction, was not Nall liable to the Planter's Manufacturing Company, upon these demands; and was it not a discharge to him, upon this indebtedness? And was it not a good payment to Mr. Wooten, who was also bound upon these same claims?

It is suggested in the argument—perhaps it appears from the record—that Kirkpatrick acted as the agent of Nall & Wooten, and that the note and account were satisfied out of the funds belonging to his principal; but the evidence does not show this. At any rate, it was a question of fact to be submitted to the Jury. It may not be conclusive that the money was advanced out of his own pocket. It is certainly *prima facie* proof that it was.

The two receipts from Wooten to Kirkpatrick were withheld, upon the ground that it would be allowing the parties to manufacture testimony for themselves.

But is this so? What interest had Wooten in combining with Kirkpatrick for such a purpose? Was not his interest directly the opposite? Whatever the fact may be, such would be the judgment of law upon the case. But apart from this, admitting the transaction to be *bona fide*, and what right has this or any other Court, without proof, to assume that it was otherwise? are not these receipts just such instruments as should and would have been given in conducting the affairs between these person in the usual manner? Kirkpatrick buys a lot of merchandise from Wooten and makes him two payments, at such dates and intervals of time as would likely accrue in the management of such matters. The creditor party, diligent in claiming and collecting his dues, calls for his money; the debtor party, equally vigilant in guarding his rights, exacts a receipt, which is executed and delivered; and now, when offered in proof, it is rejected, because, forsooth, it may be false and fraudulent, and fitted up to meet the case!

And so it may; and so the sun, which has risen in the east for six thousand years, may not do so to-morrow. Experience, however, would warrant a different conclusion; and so, the experience of human conduct, as to transactions similar to this, would justify a different presumption. Where an order for the payment of money, or the delivery of goods, is found in the hands of the drawee, or a promissory note is in the possession of the maker, a legal presumption is raised, that he has paid the money due upon it, or delivered the goods ordered. (1 *Starkie's R.* 225. 3 *Esp. R.* 196. 7 *Wend.* 198. 9 *Ibid*, 323. 9 *S. & R.* 385. 1 *Starkie's R.* 445. *Ibid*, 374.) So, a bank note will be presumed to have been signed before it was issued, though the signature be torn off; such being the orderly course of such business. (2 *Rob. Lou. Rep.*) The same presumption, and for the same reason, arises in favor of the genuineness of these instruments; subject to be rebutted, to be sure, as are all other presumptions. Mr. Wooten having been excluded from testifying, in what other way could these payments have been proven, but by the re-

ceipts? Indeed, had the attempt been made to supply this proof by parol, and it had appeared that receipts had been given, the witness would not have been allowed to proceed until they were produced or accounted for; for, although receipts may be contradicted by oral testimony, still they are *prima facie;* the best evidence of the facts which they recite.

[3.] [4.] [5.] [8.] The exception of Col. B. W. McCune having been waived, and finding nothing in the charge requiring criticism, we proceed to examine the only remaining, and by far the most important question in this record, namely: whether Wooten be a competent witness in behalf of Kirkpatrick, with or without the release tendered, and notwithstanding the offer made to pay all costs which had accrued, and to deposit whatsoever sum of money the Court might direct, by way of indemnity against all future costs.

To the action instituted against Wooten & Kirkpatrick, as partners, Wooten made no defence. Kirkpatrick pleaded that he was no partner. A verdict and judgment were rendered against both defendants, from which Kirkpatrick, alone, appealed; and it was upon the appeal trial that the testimony of Wooten was offered, by Kirkpatrick, to sustain his plea, and rejected by the Court; and upon the ground of his being a party to the record.

In *Allison vs. Chaffin and another*, (8 *Ga. R.* 330,) this Court held that where an appeal is entered according to the Act of 1839, by one of several defendants, the party not appealing is bound by the first verdict. And if this be so, and that decision was a correct construction of the Act, there is, of course, an end of the question; for Wooten having ceased to be a party to the record, in the sense in which that term is used by Courts, which hold that such a party is incompetent to testify, no such objection could operate as to him.

I have always believed there were intrinsic difficulties in executing the Act of 1839. (*See* 1 *Kelly*, 475, 484.) Sub-

sequent discussions respecting it have not changed that opinion.

We gather from the preamble to the Act, that a contrariety of opinion existed among the Judges of the State, and a different practice prevailed in the various circuits, touching the right to appeal, under certain circumstances. To remedy this inconvenience, and to make the law uniform, it was provided, that whenever there was more than one party plaintiff or defendant, and one or more of said parties plaintiff or defendant desired to appeal, and the other or others failed or refused to do so, it should be lawful for any party, plaintiff or defendant. to enter his appeal, under such rules and regulations as are now provided by law; and that upon the appeal of either plaintiffs or defendants aforesaid, the whole record should be taken up; but in case damages should be awarded upon such appeal, such damages should only be recovered against the party or parties appealing, and their securities, and not against the party or parties failing or refusing to appeal. It is further declared, that in case any security or securities shall be compelled to pay off the debt or damages for which the judgment may be entered in any cause, he, she or they shall have recourse only against the party or parties for whom he, she or they became security or securities.

Those who controvert the construction put upon the Act of 1839, by this Court, maintain that one of several plaintiffs or defendants may appeal for the whole, and that those who fail or refuse to appeal, will, nevertheless, be bound by the final judgment, except as to damages. And to show that this is the meaning of the Act, reference is made to two clauses thereof, namely: that the whole record shall be taken up, and that damages shall be awarded only against the party appealing.

We do not think either or both of these provisions conclusive upon the point. "*The whole record shall be taken up.*" Of course, whether the appeal be entered by *all* the parties, or any one or more of them, the appellate tribunal could not and would not act upon a partial record. This very case was

appealed from the Inferior to the Superior Court. It was indispensable, therefore, that the whole record be sent up. The entire transcript of the proceedings below should be transmitted to the higher Court. We repeat, the argument deduced from this requisition is by no means conclusive. Indeed, we must say, that to our mind, it reflects no light upon the question.

Again, as to the damages: It is triumphantly asked, why restrict the recovery of damages to the party appealing, if the rest were dropped upon the appeal? Our response is this: nothing is more common in our legislation than these supererogatory provisions. They are inserted, *ex cautela*, to supply some supposed deficiency—to make assurance doubly sure. In proof of this, we refer to another portion of this same Statute. In the second section, it was declared that damages, for a frivolous appeal, should only be recovered against the party or parties appealing, and their securities; and yet, in the very next section, it is declared that securities who shall be compelled to pay off the debt or damages, shall have recourse only against the party or parties for whom he, she or they became security or securities. Now, of course, the party failing or refusing to appeal, gave no security, and no damages could be assessed against such. How then could a security, who paid damages, have recourse over against one who was not, by the express terms of the Act, liable for them? This restriction, like the other, was inserted out of abundant caution, and is, in fact, supererogatory and suppletory. And yet, this additional section was inserted at the instance of Mr. Miller, one of the first Jurists of the State, by way of amendment to the bill, as it was reported to the Senate from the House of Representatives, in which it originated. (*See Journal of the Senate of* 1839, *page* 335, 336.)

But an attempt is made to draw an analogy from the writ of error, in which one may take out a writ of error in the name of all. In my humble judgment, the analogy cuts the other way. It is true that one of several parties, cannot prosecute a writ of error alone. And in analogy to this prac-

tice, the Courts in Georgia generally held, before the Act of 1839 was passed, that one of several parties could not appeal alone. It is also true, that in England one might take out a writ of error in the name of all. But what then? Were the co-plaintiffs in error compelled to continue the litigation, willingly or unwillingly? By no means. If the others refused to join in the prosecution of the writ, they might be summoned to the Court of error and sever; or what is more customary in the Courts of this country, if they made default of appearance, or moved to withdraw, an entry thereof is made on the record, after which he who sued out the writ may go on alone.

But here, it will be perceived, that a means of escape is furnished for those who are content to abide by the judgment already rendered. Not so, however, under the interpretation now sought to be put upon the Act of 1839. And thus, the principle of the analogy not only fails, but operates the other way. And still more strongly, when viewed in another aspect, and applied to the case at bar. All the authorities agree, that only those against whom judgment passes, can have error. If, for instance, there be five defendants, three of whom are acquitted, error must be by the two only who are convicted. Now, while it is true that the judgment in this case was joint, as against Wooten & Kirkpatrick; still, it is apparent that, upon the reasoning upon which the foregoing principle is sustained, it must be looked upon as a separate judgment against Kirkpatrick only. Wooten never disputed his liability. He set up no defence. The only plea put in was by Kirkpatrick, which was a denial of the partnership. He was convicted, and he alone appealed. And I doubt not but that he alone might have prosecuted his writ of error in the case. Substantially then, at least, and for the purpose of testing the legality of this testimony, it seems to me that Wooten should be considered as being severed from his co-defendant upon the appeal.

Again, it is contended that it is right, in itself, that all the parties should be bound by the verdict on the appeal, whether

they desired to litigate further or not. The only reply I have to make to this suggestion is, that even my *judicial* republicanism is too radical and stubborn to hold, that one of a half-dozen plaintiffs or defendant should control, at his option, the rest of his associates. Better, rather, that no appeal be allowed, unless at the instance of *all*, or at least, a *majority* of the parties, than granted upon such unequal terms.

Further, and finally, it is said, that this is an easy working rule; and one which frees the law, from all the perplexities which any new construction involves. Simplicity and practicability in a rule of construction are highly commendable, provided those qualities be not exalted above and preferred to right and justice. The edict of the despot, and the ukase of the autocrat, possess these qualities in an eminent degree—"Do this or die." How simple and practical! and yet, how greatly preferable, the checks and balances of our federative system, complicated though it may be! Who would hesitate to choose between the simplicity of the arbitrary rules of the Common Law, the code of a comparatively rude and barbarous people, and the complexity of the Civil Law, which very complexity was the result of a much higher civilization; and as one of the fruits and proofs thereof, an extreme anxiety to mete out to every litigant the exact measure of justice in questions of *meum* and *teum*. Compare the *sic jubeo* simplicity of Lord Jefferies' administration of the law, with that of the doubting, and *doubting*, because profoundly learned, and conscientious Lord Eldon, and how striking the contrast!

Concede to them all that is claimed for the construction which I am combatting, namely: that it establishes a simple and easy working rule, still, the inquiry recurs: Is it reasonable? Is it right? On the contrary, in the language of my brother WARNER, in *Allison and Chaffin*, is it not better "to regulate the rights of the parties according to their own action in the matter? And where one of the parties, either a joint plaintiff or defendant, is *satisfied* with the first verdict, and is

unwilling to litigate farther, let the first verdict, as to him, be *conclusive*, as to *his* rights; and so, with the party who is *dissatisfied*, and desires to litigate his rights on the appeal." And if there be obstacles in giving this construction to the Act, as it now stands, let the Legislature so modify or alter it as will prevent all practical inconvenience, and secure the ends of justice.

The author of *Hotchkiss' Digest*, a work examined and approved, as having been "*faithfully executed*," by Wm. T. Gould, Robert M. Charlton and Carleton B. Cole, Esquires, and adopted by the Legislature—a most admirable book, by the way, notwithstanding all the flings which have been made at it—considers the parties as "*severed*" by the appeal. (*Page* 601.) And such, I have no doubt, is the fact, whatever may have been the legal effects of such severance.

But admitting that Wooten occupies the same relation, only, toward this case, by not appealing, as he would do had he suffered judgment to go against him by default; still, we maintain that he is a competent witness.

The Court below refused to permit Wooten to testify, upon the ground that he was a party to the suit upon the record. And the question is then presented, whether the mere fact that the name of a witness appears as a party upon the record, is sufficient, even though it should appear affirmatively, that he has no interest in the event of the suit to exclude him. And the question is one, in respect to which different Courts have entertained different opinions. But I trust I shall be pardoned for saying, that as for myself, I not only consider the argument without force, but hardly deserving the credit of being plausible, which would exclude such testimony; and I make this declaration in the face of the uniform adjudications in the Supreme Court of the United States to the contrary; and before which Court it is no longer considered an open question. It is true, that Court admits, that in *all* the cases in which the question had arisen, the party was liable for cost of suit; and therefore, interested; still, they say that the exclusion has been uniform and placed on the ground of

policy; (5 *Howard*, 91;) a policy which is undefined—undefinable—intangible and imaginative.

In *Safford vs. Lawrence*, (6 *Barbour's S. C. Rep.* 566,) this whole doctrine is ably and thoroughly reviewed; and it is impossible to read that masterly opinion and doubt that a party to the record is a competent witness, provided he be disinterested. And that interest, alone, and not any conjectural policy, is the sole test of competency. The admission or rejection of the witness depends upon the result of this inquiry.

If this be the well established *English* rule, as is shown in *Worrall vs. Jones*, (7 *Brougham*, 379,) where Chief Justice *Tindal* declared—"that no case could be found in which a witness has been refused, upon the ground, in the abstract, that he was a party to the suit," how much more should it be enforced in this State, where we are not obliged to go into Chancery to procure the testimony of a party, but where *parties to the record*, plaintiffs and defendants, are examined upon the stand, *at Law*, just as other witnesses are; and where they are compelled to testify when called, even against their interest?

Upon this subject, no member of this Court, I believe, has any difficulty. At any rate, I can speak for myself.

But we now approach the exact point of divergence; for notwithstanding the contrariety of opinion as to the proper interpretation of the Act of 1839; still, could we have harmonized as to what would have been the result of a verdict in favor of Kirkpatrick, the judgment of the Court would have been unanimous.

The position occupied by Counsel for the defendant in error is, that one of two defendants in an action *ex contractu*, who had been defaulted, is not a competent witness for the other, because a verdict in favor of the other, placed the plaintiff in a situation in which he could not avail himself of the default; and consequently, the defendant who was thus defaulted, had, of course, an interest to testify in favor of his co-defendant.

To apply the principle to the case under discussion. Wooten, by not appealing, may be viewed as suffering judgment by default; indeed, he never did appear and plead to the action; still, he was not a competent witness for Kirkpatrick, because, by defeating the suit as to Kirkpatrick, the action being joint, it would abate as to both, and must be renewed separately against him, before a recovery could be had, not denying but that he would be ultimately liable for the debt or damages.

[6.] We do not dispute that this is true at Common Law: That the general rule is, that where an action is brought against two defendants upon a joint contract, that in such case, judgment cannot be given against one defendant without the other. (1 *Chitt. Pl.* 31. 1 *East.* 48. *Sheriff et al. vs. Wilks.*) And that under the operation of this rule, Wooten might possibly be excluded.

[7.] But taking the whole tenor of our legislation upon this and kindred subjects, should an action abate or be quashed, on account of the improper joinder of defendants in this State? We are clear, that it should not; but that the same should proceed against the other defendant or defendants, and be prosecuted to final judgment and execution, in the same way and manner as if the defendant or defendants, found not liable and discharged, had not been originally joined in the suit.

Take the second section of the Act of 1850, which provides, that "in suits by or against partners, or when any two or more persons sue or are sued in the same action, and the name of any person, who ought to be joined in such action, as plaintiff or defendant, is omitted—on ascertaining the same the omission shall be amended instanter." (*Cobb's Digest*, 493.)

Should any Georgia Court hesitate a moment to construe this Statute as applying to the converse of the case therein specified? What! clothe the Courts with authority to add a *new* defendant *instanter*, and not allow them to prosecute the suit against one or more, against whom a good cause of ac-

tion was *confessed*, by the party himself to exist, because the plaintiff had failed to sustain the action against all the defendants! The misfortune with us, always, has been to interpret our Statutes in the light of the grotesque forms, metaphysical subtleties, narrow rules and fanciful niceties of the Common Law, as it was a century ago. The further we get from it, the better for ourselves. The Legislature have been struggling, constantly, to unfetter our people from the shackles which bind them to the *effete* institutions of a bygone age, that the citizens of our State may advance with a free and unimpeded step towards perfection. Statute after Statute is passed to pare off the excrescences of Saxon and Norman Jurisprudence. The liberality of our Courts should keep pace with this spirit of reform. We should just as soon approach, with costly offerings, the infernal deities of our druidical ancestors, *Thor* and *Woden*, to be taught religion, as to the genii of the old Common Law, to learn the correct exposition of our modern laws. We must look to the experience of our own times—the lights of our own age. We should assert our own independent judgment, and act and think for ourselves.

But suppose the Act of 1850 does not warrant us in rendering judgment against one or more of the defendants, when the action cannot be maintained against all; and that our whole Code is powerless for this purpose; can there be a doubt upon this point, under the pleading and practice Act of 1853–'4? The first section declares: "that plaintiffs and defendants, in the Superior, Inferior and Corporation Courts in this State, whether at Law or in Equity, may, at *any* stage of the cause, as matter of right, amend their pleadings in *all* respects, whether in matter of form or matter of substance only," &c. (*Pamphlet*, 48.)

Can it be possible that a plaintiff, under the ample provisions of this Statute, shall be subjected to the loss of his suit, founded on contract, because he has failed to sustain his action against all the defendants? Will not the Courts, of

course, allow him to amend his writ by striking out the name or names of those who are not liable, and proceed to take judgment as to the rest? Indeed, this practice will, we apprehend, be considered, now, as a matter of course, without any formal application to the Court and leave obtained for that purpose.

The technical difficulty, then, does not exist. And there can be no objection why a party to the record, who has been defaulted, or against whom a verdict has been rendered, and no appeal entered, and consenting to be called, should not be admitted as a witness for other defendants, provided he be disinterested. Indeed, under the Act of 1847, to compel discoveries at Common Law, and subsequent Statutes amendatory thereto, I would not hesitate to force such a party to testify, without his consent, and against his interest, provided his co-defendant was willing to risk him.

For the above reasons, we think the Court below erred, and that the judgment must be reversed.

STARNES, J.—concurring.

The difficulty in giving effect to the Act of 1839, authorising one of several parties against whom a verdict has been rendered, to appeal alone, arises out of the fact, that that Act does not go far enough in its provisions to avoid the obstacles, which, without further explanation, present themselves in the way of carrying these provisions into effect. Still, it is the law; and to my mind, it authorizes one of several defendants, against whom a verdict has been rendered, and who does not wish to appeal, to avoid further litigation, and to rest satisfied with and submit to the verdict, notwithstanding an appeal by his co-defendant, in such explicit

terms as to amount to a clear legislative direction to this effect, whatever else may be obscure, and whatever may be the inconvenience arising from such a state of things, in the event of certain contingences afterwards happening, in the progress of the cause against the party appealing.

The provision, that "the whole record shall be taken up," does not affect this view of the matter; for this provision would have been proper, though it were intended to provide that the case should exist only as to the party appealing.

Neither is the restriction of damages to the party appealing conclusive on the subject. As has been so well suggested by my brother LUMPKIN, such supererogatory provisions, inserted for purposes of abundant caution, abound in our legislation; and, it may be added, indeed, in the legislation of all civilized countries.

The effort to show an analogy between the situation of the parties to such a proceeding, and to a proceeding upon a writ of error, at Common Law, is not satisfactory; because, though it serves to show what the law might be without the Statute, it does not show what the law is with the Statute. On the contrary, as it appears to me, the Statute places the party not appealing, from the moment the appeal is entered by the party appealing, precisely in the category of one of several parties to a writ of error, who withdraws after the case is carried up to the Court of Error.

So, too, as I construe the Act of 1839, the analogy must fail, which is derived from the position of a co-defendant, in an action upon a joint contract at Common Law, against whom judgment has gone by default.

It is true, that at Common Law, a verdict and judgment in favor of the other defendant would relieve the defaulting party; (because judgment could not be given against one joint contractor without the other;) and therefore, it is always to his interest to testify in favor of the defendant litigating. But our legislation has changed this rule, certainly so far as it may apply to the case of a defendant not appealing; and

therefore, such a party need not be interested to testify in favor of the defendant continuing litigation.

I admit, as I have said, that some of the intrinsic difficulties which have been suggested by my brother, dissenting from the judgment of the Court in this case, do exist; but they arise from the action of the Legislature, and to the attention of that body we should commend them.

If any thing which I have here expressed conflicts with the opinion of the Court, in a case decided at the last term of this Court, held in Milledgeville, I desire to say, that I gave my consent to that judgment very reluctantly; that I have continued to doubt its correctness; and I fear that the hardships of that particular case influenced the Court in its judgment then delivered.

We all agree, I believe, in the opinion, that the mere fact that Wooten is a party to the record, does not disqualify him as a witness; and therefore, I shall say nothing on that subject, as the reasons for our opinion, on this point, are fully stated by my brother LUMPKIN.

BENNING, J.—dissenting.

I dissent from the judgment of the Court on one point in this case—the point as to Wooten's competency to be sworn as a witness for his partner, Kirkpatrick. The judgment of the Court is, that Wooten was a person competent to be so sworn. I think he was not.

The suit was against Wooten & Kirkpatrick. The plaintiff got a verdict against both defendants. From that verdict, one of the defendants only, Kirkpatrick, appealed. On the appeal trial, Kirkpatrick offered to examine Wooten as a witness. The Court below would not allow it. That decision,

as a majority of this Court think, was wrong; as I think, it was right. I am now to state why I think so.

In my opinion, Wooten, although he did not, himself, enter any appeal, was yet a party on the appeal. The legal effect of Kirkpatrick's entry of an appeal was, in my opinion, to make both himself and Wooten appellants. And if they were both appellants, one could not be a witness for the other. That is a proposition which nobody disputes.

Were they both appellants? Is it the legal effect of an appeal entered by one of two or more plaintiffs, or one of two or more defendants, that his co-plaintiffs or co-defendants become equally, with himself, appellants? I say it is. I say that this effect is produced by the Act of 1889, "to explain and amend the Judiciary Act of 1799, so far as concerns the granting of appeals in certain cases." That Act is in the following words: "*Whereas*, a contrariety of opinion exists among the Judges of this State, and a different practice prevails in the different Judicial Circuits thereof, touching the granting of appeals under certain circumstances, for remedy whereof—

"SEC. I. *Be it enacted*, that from and after the passage of this Act, it shall and may be lawful, whenever there shall be more than one party plaintiff or defendant, and one or more of said parties, plaintiff or defendant, desire to appeal, and the other or others refuse or fail to appeal, it shall and may be lawful for any party, plaintiff or defendant, to enter his appeal, under such circumstances as are now provided by law.

"SEC. II. Upon the appeal either of the plaintiff or defendant, as aforesaid, the whole record shall be taken up; but in case damages shall or may be awarded upon such appeal, such damages shall only be recovered against the party or parties appealing, and their securities, and not against the party or parties failing or refusing to appeal.

SEC. III. In case any such security or securities shall be compelled to pay off the debt or damages for which judgment may be entered in any cause, he, she or they shall have re-

course only against the party or parties for whom he, she or they became security or securities."

SEC. IV. (Repealing clause.) (*Cobb's Dig.* 500.)

"The *whole record* shall be taken up." What does that mean? It means, that the *whole case* shall be taken up. What else can it mean? The expression has reference to the *case*—not to the mere *record* of the case. It means, that not merely a part of the case, but that the whole of the case, shall be taken up. But if the whole of the case is to be taken up, then, of necessity, every party to the case has to be taken up; and one party to it just as much as another. And if all the parties are taken up, all are parties on the appeal; else, they are parties nowhere. They certainly are no longer parties below. With equal certainty, they are parties "taken up." To what place are they taken up? To the place of the appeal. There is no other place to take them to.

And if the effect of taking a case up be to vacate the judgment below, as to one party, it must also be to vacate the judgment as to the other parties. When the cause is the same, the effect must be the same.

So, if the effect of taking a case up be to subject one party to the judgment above, it must also be to subject all the parties to that judgment. The case is taken up, equally as to all.

All this seems to me the necessary result, from the plain import of the words—"the whole record shall be taken up."

But if I had a doubt as to the import of these words, that doubt would, as I think, have to yield to two implications contained in the Statute: 1. "But in case damages shall or may be awarded upon such appeal, such damages shall only be recovered against the party or parties appealing and their securities, and not against the party or parties failing or refusing to appeal." What reason was there for this provision, if the case, as to the parties not appealing, was not to be on the appeal? What use is there in saying that the damages shall not be recovered against one who is not in Court—not before Court or Jury? But if one is in Court—is before

Court and Jury, and there as an appellant against his will, there is good use—most excellent use—in saying this. One so situated ought not to be made to pay the damages due for a frivolous appeal. The strong implication, then, from the above language is, that by the act of appeal of one out of two or more plaintiffs or defendants, the case is put upon the appeal, as to all.

2. A similar implication, and one of equal strength, is contained in the third section. Why restrict the recourse of the sureties on the appeal to the party for whom they became sureties, if that party was to be the only party on the appeal? Can there be a reason for it? Whereas, if the intention was, that there were to be other parties on the appeal—parties carried there against their will, by their fellow-parties, there is good reason for the restriction. The implication, then, must be, that there were to be such other parties on the appeal.

I insist, then, that according to what this Act says three times, once expressly and twice impliedly, the effect of an appeal entered by one of two or more parties on the same side, is to place the whole case on the appeal, and to make all of the parties on that side appellants.

And here I might stop; for is there any thing which a Court can even notice, if that thing be in opposition to the language of the Legislature?

But I will go on a little longer, in the endeavor to show that this, my argument, from the "words" of the Act, is sustained by the argument, from "effect and consequences."

1. Unless the conclusion I have come to is the true one, the Statute is, as it seems to me, without any effect whatever. If we say that when one only out of two or more plaintiffs or two or more defendants appeals, one only gets upon the appeal, what effect do we give to the Statute? Could we have said aught but this; or, at least, less than this, if the Statute had never been passed?

2. How will the opposite conclusion work? That conclusion is, that if one only out of more than one plaintiff or de-

fendant appeals, the effect is, that as to him, the case is on the appeal, not as to his fellows; that is, that the case is severed into two parts, one of which exists on the appeal—the other, somewhere else. Now how can a case in that situation—a case, two in one, one in two, be worked out to any harmonious result? Suppose a case in which one only of two *plaintiffs, joint promisees*, and say from a verdict for $500 in favor of both, and that on the appeal the verdict is for $1000. In such a case, what is it that the defendant is to pay? There are two judgments against him—one in favor of one of the several plaintiffs—the other in favor of the other; and these may be in different Courts—one in the Superior, the other in the Inferior. Is the defendant to pay both judgments? Is he to pay the whole of the judgment on the appeal, and none of the other? If so why, both judgments being good alike? And if so, in what proportion is the money, the $1000, to be divided between the two several plaintiffs—plaintiffs who are joint promisees—one admitting, by not appealing, that the joint promise entitled the joint promisees to only $500; the other, by appealing and getting a verdict for $1000, denying this and insisting that the joint promise entitles the joint promisees to $1000. But with what propriety could the *defendant* be forced to pay more than the $500, that being as much as one of his joint creditors claimed of him; that is, if the admission of one of two joint creditors is good against the other?

But suppose the result of the appeal trial, in the case assumed, be the reverse; suppose the verdict on the appeal, instead of being in favor of the plaintiff, and for $1000, should be for the defendant; is that plaintiff, who does not appeal, to lose his judgment for the $500? If he is not, who is to pay it to him? not the defendant; the final trial shows that the defendant owes nothing—the plaintiff by whose fault, in appealing, he lost the judgment for the $500? That plaintiff had the right to appeal.

The consequences will be equally incongruous, if we take the case of an appeal entered by one only of several *defend-*

ants. Suppose of two defendants, joint promissors, one only enters an appeal from, say a verdict for $500, and that on the appeal, there is a verdict for $1000; are both verdicts to be enforced? If not, which is to be, and why that one rather than the other? And of what is to be paid, whatever it is, what is to be the proportion paid by each defendant?

And then, what will be the form of the execution in either of the supposed cases, say the first verdict was in the Inferior Court? What parties will the Clerk of the Superior Court put in the execution? Can he put in the execution parties not in his Court? And none but the parties appealing would be in his Court, if the Statute means what a majority of this Court think it does; for if the other parties be in his Court, where, in the Court, would they be? Not on the appeal; still less any where else. And yet, those other parties ought, somehow, to be in the execution. And what must the execution command the Sheriff to do? Which judgment must it command him to execute? How much money must it command him to raise? Or is one execution to go from the Superior Court, and one from the Inferior? If so, how is the Sheriff to escape executing both?

I see no solution to the many difficulties that must grow out of such an interpretation of the Statute as this of the majority of the Court.

On the other hand, no difficulties will grow out of the practical working of the Statute, interpreted as I think it should be. If so interpreted, appeals under it will be like ordinary appeals—appeals in which all the parties on the appealing side join.

And in permitting one of two plaintiffs, or of two defendants, to put the case on the appeal as to both, without the consent, or even against the consent, of the other, I see nothing unjust—nothing discountenanced by analogy—rather, I see something which possesses, I think, a preponderating utility.

The acknowledgment or the release of one of two or

more joint promissors or partners, binds the others, whether they consent to the acknowledgement or release or not.

And the power to make such acknowledgements and releases, is a far higher power than the power in question. Even if one of two parties appeals against the consent of the other, and forces the other to go with him, the chances are, at least even, that the other will not suffer by it—that the verdict on the appeal will be no worse than the verdict below.

In most cases, however, the party not joining in the appeal is passive—is indifferent whether there be an appeal or not. He is a surety or a hopeless insolvent, or something that makes him indifferent as to what becomes of the case. What great harm can there be in letting his fellow carry such a party with him on the appeal? Why compel such a party to be at the trouble of joining in the appeal? And if one who is a surety, omit, by carelessness, to join his principal in an appeal, and on the appeal, the principal gets off clear, how hard it would be to make the surety pay the verdict below? For in such a case, he would have no contribution from his principal. Would it not be better that he, too, were considered to be on the appeal, that he might go clear with his principal? The plaintiff, it is true, might lose the verdict below; but then he ought to lose it. And may we not safely say that a plaintiff ought to lose the verdict below, in every case in which he is defeated on the appeal trial, even although all of the defendants may not have appealed from the verdict?

Is it to be said, that if the party that appeals gets off upon the appeal trial, the party that does not appeal cannot complain if he is made to pay the verdict below? Is it to be said, that his not appealing is evidence that he is satisfied with the verdict? But can this, in fairness, be said? What verdict is it with which the party not appealing is satisfied? It is a verdict against him and *another or others, jointly;* a verdict, therefore, the weight of which another or others are to bear equally with him; a verdict, the weight of which, if he is a surety only, another or others are exclusively to bear. This is the verdict with which he is content. But this

verdict becomes a very different sort of thing, if, when the other party or parties have appealed from it, it remains in force against him alone. And his having been satisfied with the verdict, as it was when it was rendered, is no evidence that he is satisfied with the verdict as it is, after it has undergone this metamorphosis.

No. 89.—SOLOMON HART, administrator, &c. plaintiff in error, *vs.* ROSWELL POWELL, defendant in error.

[1.] Declarations of the defendant, made immediately after the fact as to the circumstances under which he killed a runaway slave, are admissible in evidence; and when the precise time which intervened between the homicide and the statements cannot be ascertained, it may be left to the Jury to determine whether they were made without premeditation or artifice, and without a view to the consequences, or were merely made to color the transaction.

Trespass, in Upson Superior Court. Tried before Judge STARKE, May Term, 1855.

This was an action of trespass brought by Absalom C. Cleveland, in his life time, against Roswell Powell, for the recovery of the value of a negro man slave, Bill, the property of the said Cleveland.

The questions in the case arose upon the admissibility of certain testimony. It appeared in evidence that the slave was run away; that application was made to the defendant, who owned track dogs, to go with his dogs, for the purpose of trailing and capturing the negro; that he did so; and, after pursuing him for some time, he came up with him; a contest ensued between the defendant and the slave, which resulted in the defendant's shooting and killing him.

On the trial, the defendant introduced, as a witness, James

H. Stafford, who testified, "that he started, in company with the defendant, after the negro. The last witness saw of defendant he was ahead, about a mile and a half from the point where the negro was killed. In heading a branch, witness got behind; he broke his girth, and stopped for a short time to mend it. He was directed to the place of the killing by the blowing of the horn. When witness reached the place, some two or three persons were present; the negro was in the head of the swamp; the defendant was some thirty or forty steps from the negro, on the side of the of swamp; the negro had been shot. Some half an hour had intervened from the time witness last saw defendant, as stated above, until he came to the place where the negro had been shot."

Defendant here proposed to prove by the witness, the sayings of defendant about the killing of the negro. Plaintiff objected. The Court over-ruled the objection, and plaintiff excepted.

The witness then stated, "that when he came up to where the negro had been shot, that the defendant said he had, of necessity, to shoot the negro, and he feared he had killed him; and if he had, he would not have done it for all the negroes on the earth," &c. The witness proceeded to give, in detail, all the sayings of the defendant at the time, in reference to the killing, going to show that the negro had a knife and a stick; had cut three of the dogs; and finally turned, and made an attack upon the defendant; and that he was forced, in self-defence, to shoot him.

The defendant then introduced Jonathan Stamps, who testified, "that he went from his field to help take the negro. When he got within seventy-five yards of the place, he heard some one call twice, saying, 'go after the doctor, for I think I have killed a negro.' When witness got to the fence, he met the defendant, who told witness that he was afraid he had killed a negro; said he had to do it to save his own life; that if he could have helped it, he would not have done it for all the negroes on the earth;" and the witness proceeded to detail all the sayings of the defendant at the time, going to

show that it was in self-defence he killed the negro. To which testimony plaintiff objected. The Court over-ruled the objection, and plaintiff excepted.

HAMMOND; STUBBS & HILL, for plaintiff.

O. C. GIBSON, for defendant.

The Court not being unanimous, delivered their opinions *seriatim*.

LUMPKIN, J.

The facts in this case are these: Bill, a negro fellow about twenty-five years old, and worth $1.000, had runaway from his owner, Absalom C. Cleveland, deceased, the intestate of the plaintiff, in 1852. His master resided in Marion County. It was in proof, by the testimony on the part of the plaintiff, that he was a negro of violent character, and considered a dangerous man in the neighborhood. He had knocked several negroes in the head; had been absent for sometime; and Mr. Cleveland admitted that he had had a difficulty with some one who had tried to catch him, and had "made fight upon his pursuer with a stick."

Being found lurking about a plantation in Upson County, having been run off from the fodder-house on the farm of Mr. Stafford, a little before day in the morning, application was made to the defendant to track him with his dogs, which were trained for that purpose. Mr. Powell being in feeble health, objected to going, but finally yielded, with the understanding that some one else must do the running, as he was unable. Mr. Stephens, a neighbor, was sent for to assist.

When the dogs first struck the track, all the party started together. The defendant did not attempt to keep up; and Stephens was bothered to keep the dogs on the trail. When they got the scent the second time, (after having lost it,) and led off, Powell followed. The last that was seen of him, he

was a mile and a half distant from the place where the negro was killed; and a half hour intervened before the witness, Stafford, came up—being directed to the spot by the blowing of the defendant's horn. When he got there, Powell and the two Howells were present. The negro was lying in the head of the branch and the defendant standing on the side of the swamp, about 40 steps off. A physician was sent for as soon as possible. The negro was taken up by the company—Powell assisting—and removed to a higher place. It was a muddy, marshy spot were he was lying, interspersed with turf. One, with care, could keep out of the mud, but not if he was in haste. The ground was stirred and the bushes bent, as though there had been a scuffle where the negro lay. The defendant was informed, in the morning before starting, that Bill had a knife and a stick, which induced him to get his pistol. Bill was a man of ordinary strength, weighing 150 lbs. The account that the defendant gave of the matter was, that the negro had killed one of the dogs and disabled the balance, that were capable of doing any thing; that refusing to submit, he shot, at first, to disable him, hitting him in the thigh; that he fired a second time, and missed; when the negro, advancing upon him, a conflict ensued, and he discharged the third load with his revolver. After the negro was removed, the stick was picked up, and the knife found in the mud where he was lying. The knife had blood upon it.

There were two gun-shot wounds—one through the flesh of the thigh, entering about four inches above the knee, and passing on the inside of the bone, ranging upwards and backwards; the other entered the back, about one inch to the left of the spine, about the fifth bone of the dorsal column, and ranging upwards to the left side, below the collar bone, about the middle.

The only question in this case is, were the declarations of the defendant competent evidence?

Mr. *Greenleaf* says: "There are other declarations which are admitted as original evidence, being distinguished from hearsay, by their connection with the principal fact under

investigation. The affairs of men consist of a complication of circumstances so intimately interwoven, as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and in its turn, becomes the prolific parent of others; and each, during its existence, has its inseparable attributes and its kindred facts, materially affecting its character and essential to be known, in order to a right understanding of its nature. These surrounding circumstances constituting a part of the *res gestæ*, may always be shown to the Jury along with the principal fact; and their admissibility is determined by the Judge, according to the degree of their relation to that fact; *and in the exercise of his sound discretion*, it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description." (1 *Greenlf. Ev.* §108.)

True, the principal point to be observed in all cases is, whether the declarations offered in proof were cotemporaneous with the main fact under consideration; for if they are merely the narrative of a past occurrence, they cannot be received in evidence: still, much latitude of discretion is allowed to the Courts. And if the statements tend to illustrate the issue and to assist the judgment which is to be formed upon the whole matter; if the declarations derive a degree of credit from their connection with the surrounding circumstances, and independently of any credit to be attached to the speaker, they should, in such cases, be admitted in evidence.

What time elapsed between the homicide and the account given of it to the witnesses, it is impossible to assume with any degree of accuracy. It was certainly less than thirty minutes; because Stafford and Powell parted a half hour only before the killing, and Powell had to go one mile and a half before he came up with the boy. When the rest of the company arrived, the negro is found dead in the swamp at the head of the branch, to which point he was pursued by the dogs; he is not torn or lacerated; the dogs are cut so as to be disabled from aiding in the capture; his stick and knife are by his side; there are signs of a scuffle having taken

place where the body lay, and Mr. Powell, at the distance of some forty steps, is blowing his horn to attract his companions, and calling out for a physician to be sent for, for that he fears he has killed Bill, and that he would not have done so for all the negroes above the earth; and he proceeds to relate the facts and circumstances of the killing.

We ask, do not his declarations elucidate the facts with which they were connected? Were not the Jury authorized to believe that they were made without premeditation or artifice, and without a view to the consequences? We think so, unquestionably.

Direct proof, in such a case, is impossible. The defendant, himself, was the only witness of the facts which constituted his defence. Not having anticipated the catastrophe, no prudence, no sagacity, no foresight, could have prompted the defendant to have prepared himself with evidence to prove his innocence. It is a hard rule of law which presumes every homicide to be murder, and imposes upon the accused the burden of showing that the offence is of a mitigated character. It is equally hard to close the mouth of the prisoner from testifying as to the facts attending the homicide, when no other evidence can be adduced—a principle known only to the Common Law.

But to hold that this defendant could not exculpate himself by his own statement of the facts, and to leave him without redress, to be mulcted in damages, and to pay the highest penalty known to the law, for reluctantly undertaking the performance of a high duty, through mere kindness, would be cruel indeed. We do not say that the Jury were bound to believe the explanation. All such statements should be weighed with candor, but with circumspection. The party may not have acted in self-defence; he may have shot the negro in a spirit of revenge, and to save his dogs; the character of the wounds may contradict his statement. All this and much more may be true; for we are aware that the defendant was under a strong temptation to give a favorable, not to say false, coloring to the case. All this, however, was

for the Jury. It was for them to determine whether his account was natural and consistent with the circumstances, or otherwise, and a mere sham.

In criminal proceedings, the declarations of prisoners have been received to explain their conduct, as in an indictment for larceny, that he took the goods, claiming the property. (1 *Hale's Pl. Cr.* 509. 2 *Barn.* 174.) The Jury hear the evidence, and then judge whether these declarations were genuine claims of property, though mistaken, or made to color a stealing. In trials for murder, declarations of the prisoner, antecedent to the fact, are admissible to reconcile or explain his conduct, and to discover *quo animo* the fact was committed. And in the hottest times in trials for high treason, the declarations of a prisoner have been admitted in evidence to explain his acts. (*Howell's State Trials, passim.*) Under any view of this case, I should be unwilling to disturb the verdict of the Jury. *This slave was in a state of revolt, as every slave is when in open and forcible resistance to lawful authority.* His pursuer had a right to arrest him. (*Cobb's Digest*, 976, 1020.) He was in the performance of a meritorious service. The negro's character was notoriously daring and dangerous. He was armed with a knife and a bludgeon, the latter of which he had already used to prevent a previous attempt to capture him. Under these circumstances, I should not feel inclined to scrutinize, with surgical skill, the direction of the wounds, in order to ascertain how the boy was killed; nor to determine, with mathematical precision, the number of minutes which transpired between the killing and the declarations. Indeed, the course of balls is frequently so extraordinary, that I should be exceedingly reluctant to bankrupt any man in fortune and character, upon a mere hypothesis. I entertain the most profound respect for the medical profession; and yet, it must be admitted that theory and fact do not always harmonize as to gun-shot wounds. "*Amicus Plato, Amicus Socrates, sed magis amica veritas.*"

It is related by Dr. Hennen, as having occurred to a friend

of his in the Mediterranean, that a ball which struck about the *pomum adami*, travelled completely round the neck, was found lying in the very orifice at which it had entered. The same author states, that in one instance which occurred in a soldier, who having his arm extended in the act of endeavoring to climb up a scaling ladder, had the centre of his shoulder pierced by a ball, which immediately passed along the limb and over the posterior part of the thorax, coursed along the abdominal muscles, dipped deep through the hypogastric artery, and presented itself on the forepart of the opposite thigh, about midway down.

Now we have often heard of an individual being "*shot all to pieces*," but never before by one ball. Who would have doubted—what adept in the science would not have testified—that this poor fellow had been shot a half dozen times?

In another case, a ball which struck the breast of a man standing erect in the ranks, *lodged in the scrotum!* The gallant and ever to be lamented Col. Craig, was shot in the back at Cerro Gordo; the ball pursued a circuitous route around his body, on the outside of the skin, to the breast.

But we forbear to multiply examples. We are sustained by the highest medical authority, in asserting that balls take very unusual courses, "not at all to be accounted for by any preconceived theories drawn from the doctrine of projectiles, nor to be explained by any diagrams formed upon mathematical rules." (*Med. Jur. by J. H. Paris, Fellow of the Royal College of Physicians, and Q. S. M. Fonblanque, Esq. Barrister at Law*, 2 *Vol.* 126.) "These considerations," continue the learned authors, "ought to render the surgeon very cautious how he delivers his opinion *as to the direction the shot was fired.*"

We would remark, in conclusion, that evidence must accommodate itself, and it is constantly doing so, to the state of society and the concerns of the world around us. That the statements of Powell were made a very short time, if not directly, after the homicide, is plainly proven. To preclude this proof, would be to shut out the party's only defence. It

was the immediate promulgation of the homicide, and the facts attending it. For myself, I am perfectly prepared to meet the responsibility of such a precedent, and to hold that the Court below, *under the circumstances of this case*, did not err in admitting the testimony to which the plaintiff has excepted.

BENNING, J.—concurring.

I think it was right to admit the evidence.

The sayings must have been uttered within less than thirty minutes after the shooting; they may have been uttered within five or two. They were uttered before the defendant left the place of the occurrence. What we know is, that these sayings must have been uttered very soon after the doing of the act they went to explain; how soon afterwards they were uttered, is what we do not know. If there is a doubt as to the admissibility of evidence, I think the side for admitting the evidence ought to have the benefit of the doubt. Suppose such evidence admitted, are the Jury obliged to believe it? Surely we may trust such evidence to twelve men of average sense, with their wits sharpened by the opposing arguments of Counsel, and their frailty of judgment rectified by the charge of a Court. (11 *Ga. R.* 621, 13 *do.* 65, 1 *Green. Ev.* §108.)

STARNES, J.—dissenting.

I cannot bring my mind to the conclusion that this testimony was a part of the *res gestæ* of this transaction.

I know that it is difficult to define what does always constitute the *res gestæ*—that it is almost impossible always to determine what is precisely the necessary contemporaneousness in the circumstances or declarations, which it is thought serve to elucidate the main fact under consideration. And that the admissibility of these has to be entrusted very much, as Mr. *Greenleaf* suggests, (1 *Greenl Ev.* 108,) to the Judge, "in the exercise of his sound discretion." But whilst I recognize this difficulty, I think I see, very clearly, where there is no difficulty, and that is in never admitting the declarations of a party in interest, as part of the *res gestæ*, where they are not plainly, impulsively made, and where it is not clear that they were made without premeditation or artifice.

Declarations of a party are admitted in evidence as part of the *res gestæ*, only upon the presumption that they elucidate the facts with which they are connected, having been made without premeditation or artifice, and without a view to the consequences. (1 *Stark. Ev.* 49. *Scaggs vs. The State*, 8. *Smead. & M.* 726.) Where such declarations are merely *narrative of a past occurrence*, they cannot be received as proof of the existence of such occurrence. (1 *Greenl. Ev.* 110.)

This is certainly a safe and wise rule, if it be safe and wise to exclude hear-say testimony, and the declarations of a party in interest, as to his own case. And to my mind, it is quite clear that the declarations of the defendant in error, in this case, do not fall within this rule.

It is admitted that the witnesses who speak to these declarations of Powell, did not come up to him after the slave was killed, until some minutes had elapsed. But it is said that Stafford, the principal of these witnesses, must have arrived a very few minutes after the slave's death—so shortly as to render what the defendant in error said to him, a part of the

transaction. The matter, however, remains in doubt, according to this proposition. It is not entirely clear, that the witness did arrive in a very few minutes after the death of the slave; and I am strongly impressed with the opinion, that in such a case, the Court should not permit a party to make testimony for himself, unless the transaction and the declarations are clearly shown to be contemporaneous.

It was said that this might have been submitted to the Jury. But it is the province of the Judge to determine what is evidence for the Jury, and especially such evidence as this; and he should have found it evidence proper for the Jury, as I think, before he submitted it to them.

But if it be admitted that the witness did arrive at the place of homicide only a few minutes after the transaction; yet, the testimony shows that the defendant had blown his horn for him, after the killing; had come out from the edge of the swamp, where the slave was shot, some thirty or fifty steps; that some two or three other persons had come to the spot from a neighboring house or field; all before the arrival of the witness, and the statements made to him by the defendant. If, in these few minutes, there was time for all these things to take place, can it be said that there was not time *for premeditation and artifice, on the part of the defendant, with a a view to the consequences?*

The witness states that a half hour was about the time which had elapsed from his last seeing the defendant ahead of him with the dogs, and his coming up to him at the place of the homicide. If the defendant and the dogs passed rapidly over the distance between the point where he speaks of seeing the defendant with the dogs, and the place where the slave was killed, which distance, the witness says, was about one mile and a half, a very small portion of this half hour would have been consumed before the defendant came up with the slave; and the interval between the homicide and the arrival of the witness would have been considerable. He tells us, that not being able to cross a branch with his mule, he had to ride round a longer distance than was probably traversed by

the defendant and the dogs; and he also speaks of having to stop and mend his saddle girth. This is also suggestive of the conclusion, that he did not arrive immediately after the defendant. If, however, the track was winding, and the dogs moved slowly over the space alluded to, the interval of time which elapsed, was, of course, much less. It is impossible to determine this with precision. But it is not necessary, as I insist; for, in my opinion, there are circumstances enough, certainly, to prove that the defendant had abundant time for premeditation and artifice after the homicide, and before the arrival of the witness; and that his statement to that witness was a narrative of a past occurrence.

As I have said, after the killing, and before the arrival of Stafford, the defendant had time to come out from the swamp, some thirty or fifty steps, and to blow his horn for the witness. It seems that there was time for the witness, Stumps, after the transaction, to come to the place from his field, which must have been at some little distance; for he says, that when he got "within seventy-five yards of the place," the defendant called to him and asked him to go for a doctor. There was time, too, for one or two other persons to arrive at the place before the witness. If there was time for all these things, there surely was time for the defendant to resort to premeditation and artifice, in view of the consequences.

If, under such circumstances, these declarations be admitted, I do not see what is to prevent any man, who, unseen by others, stains his hands in his brother's blood, from premeditating his story, and making his own account of the transaction evidence on the trial.

I think the judgment should have been reversed.

No. 90.—THE HOLSTON MANUFACTURING COMPANY, plaintiff in error, *vs.* A. M. LEA, defendant in error.

[1.] The affidavit in an attachment was, that the defendant "was indebted to plaintiff on account, the sum of One Thousand Dollars, which may be subject to a set off for an unascertained sum, which, on final settlement, will be due the defendant": *Held*, that this affidavit was sufficiently certain.

Attachment, in DeKalb Superior Court. Tried before Judge BULL, April Term, 1855.

William C. Cain, Agent for the Holston Manufacturing Company, applied to S. G. Howell, Judge of the Inferior Court of DeKalb County, for an attachment against Albert M. Lea, a non-resident of the State. The said Cain, in his affidavit, swore: "that said Lea was indebted to plaintiff, on account, the sum of One Thousand Dollars, which may be subject to a set-off, for an unascertained sum, which, on final settlement, will be due said Lea from said company, for certain improvements made by him, on and about the Glass Works of said company, in the State of Tennessee."

The plaintiffs filed their declaration, at the first term of the Court. To which defendant pleaded payment and set-off.

On the trial, Counsel for defendant moved the Court to dismiss the attachment, upon the ground that the affidavit upon which it issued, was defective in this: that no sum, certain, was sworn to as being due by the defendant to the plaintiff.

The Court sustained the motion and dismissed the attachment, and defendant excepted.

BLECKLEY, for plaintiffs in error.

COOPER, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] Was it true that the affidavit was uncertain, as to the sum sworn to be due?

We think not. The affidavit said that "Lea was indebted to plaintiff" "the sum of one thousand dollars." The perfect certainty of this is not affected by what follows it. What follows it is a statement, that this debt of $1000 will be subject to a set-off. Any debt may be subject to be set off by another debt. But until one debt has been set against another, both remain *debts*. What constitutes a setting off one debt against another, it is not now necessary to inquire. It is sufficient to say, that when there is an action, there can be no set-off until the *defendant* has done *something*, showing a willingness in him for his debt to be set against the plaintiff's debt.

In this case, the defendant had done nothing to show himself willing to set the debt due him against the debt due the plaintiff.

We think, therefore, that the judgment dismissing the attachment was erroneous.

No. 91.—BRYAN W. COLLIER, plaintiff in error, *vs.* JOHN E. LYONS, defendant in error.

[1.] If A, without any contract of employment, puts the slave of B to a hazardous service, in which his life is lost, A is responsible for his value; and the worth of the property at the time it was destroyed, with the addition of interest thereon, to the time of trial, is not an incorrect measure of damages.

Trover, in Butts Superior Court. Tried before Judge STARKE, March Term, 1855.

This was an action of trover, brought by John E. Lyons against Bryan W. Collier, for the recovery of the value of a negro man, slave, Wesley.

It appeared in evidence that the defendant was the owner of a mill; the plaintiff sent his negro man, Wesley, to the mill, with corn to be ground. While there, the water-wheel got out of order; while assisting in raising or prizing up the wheel, the negro Wesley received a blow by the lever falling, that killed him. The defendant, Collier, was present, and saw the boy Wesley engaged in assisting about adjusting the wheel, though it does not appear, from the evidence, that he requested or ordered the boy to render assistance in the matter.

Among other things, the Judge charged the Jury, "that if they found a verdict for the plaintiff, they should add interest to the proven value of the slave at the time he was killed, from his death, until the present time."

To which Counsel for defendant excepted.

HARMAN; MCCUNE, for plaintiff.

FLOYD, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

The principle involved in this case has already been virtually decided by this Court.

In *The Mayor & Council of Columbus vs. Elizabeth Howard*, (6 *Ga. R.* 213,) and in *Gorman vs. Campbell*, (14 *Ga. R.* 137,) we held, that where a slave is put to a different purpose from what was intended, the hirer is responsible for loss of life, although by inevitable casualty, and although the loss arose from the voluntary act of the slave: *A fortiori*, will this liability attach where there is no contract of hiring.

Lyons sends his negro to Collier's mill, to have corn ground.

While there, it became necessary to raise the water-wheel. Either by the direction of Collier, or with his knowledge and consent, certainly, Wesley undertakes to assist in the hazardous job, and is killed within a few feet of Collier, while thus aiding and abetting. There can be no doubt but that Collier is responsible for his value.

To arrive at a correct measure of damages, the Jury, under the direction of the Court, added interest on the value, from the death to the time of trial. And we are not prepared to say that this was not right. We are not unmindful of the Statute which forbids a verdict for unliquidated damages to be increased by the computation of interest. But suppose that the Act was not intended to prohibit a resort to interest, merely as an element or criterion by which to estimate the damages. The interest on the value was less than the hire; and the verdict, as rendered, less than the largest price put upon the boy. Let it stand.

No. 92.—WILLIAM H. KING AND HENRY N. ELLS, garnishees, plaintiffs in error, *vs.* CARHART, BROTHERS & Co. defendants in error.

[1.] Debts secured by *negotiable* instruments, may be the subject of garnishment.

[2.] The transfer of a negotiable note as *collateral security*, puts the debt beyond the reach of a garnishment, at the suit of the creditor of the assignor—a garnishment served subsequently to the transfer.

[3.] If a garnishee's answer is, that he made to the debtor a negotiable note, and also, that he is well satisfied that the note was transferred by the debtor, before service of the garnishment, it is not such an answer as will authorize the Court to render a judgment against the garnishee.

Garnishment, in Bibb Superior Court. Decided by Judge POWERS, May Term, 1855.

Carhart, Bros. & Co. commenced an action of complaint against James S. Graybill, and issued a summons of garnishment against Wilfiam H. King. King filed his answer to the garnishment, in which he stated, that on the first day of March, 1855, he gave Graybill two negotiable promissory notes, one for $1250, due Dec. 25th, 1856; the other for $1161 89. due at six months after date; both of which notes were made payable to Graybill or bearer; that the $1250 note was made to take up a note due by Graybill to to Crawford H. Grier, of Jasper County; and that he had been informed the same had been turned over to Grier. The other note, deponent did not know where it was, or who owned it."

This answer was filed on the 28d day of May, 1855.

When the case was called, plaintiff moved the Court to be allowed to enter up judgment against the garnishee; which motion the Court was about to grant, on the ground that the garnishee had not stated, in his answer, who had the notes in possession; but granted further time to garnishee to amend his answer, which he did, on the 4th day of June, 1855; stating in his second or amended answer, "that he had endeavored to ascertain from Graybill, when and to whom said notes were transferred; which information, the said Graybill has refused to give deponent."

On motion of plaintiff, the Court then allowed judgment to be entered up against the garnishee, in respect to the note of $1161 89. Afterwards, and during the same term of the Court, the garnishee filed another affidavit, and moved the Court to set aside and vacate the judgment in said case.

The garnishee in this affidavit, stated that the notes had been transferred by Graybill, one to the said Grier, and the other to Nathan C. Munroe, before the service of said summons of garnishment upon him; and that the said Grier and Munroe now held and owned said notes.

The Court over-ruled the motion, and refused to open the

judgment. To which decision and judgment of the Court, Counsel for garnishee excepted.

The following are the facts in the case of *Ells vs. Carhart, Bros. & Co.*:

Garnishment, in Bibb Superior Court. Tried before Judge POWERS, May Term, 1855.

Carhart, Brothers & Co. sued Terrell and Goddard, and served Henry N. Ells with a summons of garnishment, to answer what he was indebted to the defendants. The garnishee denied having any effects in his hands, or being indebted to the defendants; and further stated, "that on the 29th January, 1855, he purchased a stock of goods from the defendants for the sum of $2000, which amount was settled and liquidated by him before said summons of garnishment was served by deducting therefrom the sum of $1082 10, which the defendants owed him, and gave his negotiable notes for the balance; and is thereby liable to the bearers of said notes, and not especially to said defendants; and he believes said notes have been transferred by said defendants."

Afterwards the garnishee amended his answer, and said that one of the notes he gave for the goods was for $350, due six months after date; that the other note was due one day after date; and that he was "well-satisfied" that the first mentioned note had been transferred before service of the garnishment; and that he believed that both had long since gone out of the possession of the defendants.

Counsel for plaintiff moved the Court to enter up judgment against the garnishee for the sum of 917 90, the amount sued for; which motion garnishee resisted, and offered to introduce evidence going to show that the said notes given by him to the defendants, had been transferred to *bona fide* holders before the summons of garnishment was served; "the Attorney for garnishee stating, in the argument, that he would swear that one of the notes, about $350, had been transferred. The Court rejected the evidence, and allowed

judgment to go against the garnishee; and Counsel for garnishee excepted.

POE; WHITTLE, for plaintiffs in error

E. A. NISBET, for defendants in error.

By the Court.—BENNING, J. delivering the opinion.

These two cases of *King vs. Carhart, Brothers & Co. and Ells vs. Carhart, Brothers & Co.* were argued together and were considered together.

The reasons urged against the validity of the judgments rendered in the cases, respectively, by the Court below, were the same in both cases. These reasons were—

1. That a debt secured by a negotiable paper, is not the subject of garnishment.

2. That if such a debt is the subject of garnishment at all, it is not the subject of garnishment, after the note by which it is secured has been negotiated; and that, in these cases, the debts which the garnishors were seeking to make the subjects of garnishment, had, as appeared from the answers of the garnishees, been negotiated before the service of the garnishments.

The sufficiency of these reasons depends, mainly, on the import of a part of the Act of 1799, "to regulate attachments." That part is in these words: "and it shall be the duty of the Sheriff, his Deputy, or any Constable, to serve and levy the same upon the estate, both real and personal, of such debtor, wherever the same may be found, either in the hands of any person indebted to or having effects of such debtor, and summon such person or persons to appear at the next Court to be held for said county, and to which the said attachment may be returnable, there to answer, on oath, what he is indebted to, or what effects of such party he hath in hands, or had, at the time of levying such attachment, which, being returned executed, the Court may, by order, compel such

person to appear and answer as aforesaid; and where any person, in whose hands any debt or effects may be attached, hall deny owing any money to, or having in his hands any effects of such debtor, it shall be lawful for the plaintiff to traverse such denial; and thereupon, an issue shall be made up, and the same be tried by a Jury; and if found against such garnishee, he, she or they shall be subject to pay the plaintiff such sum as shall be so found, and the Court shall cause judgment to be entered thereof, against such garnishee, as in other cases." (*Pr. Dig.* 31.)

According to these words, every sort of debt is the subject of garnishment; and a debt secured by a negotiable instrument is a sort of debt; therefore, according to these words, a debt secured by a negotiable instrument, is the subject of garnishment.

But it is said that to permit such a debt to be reached by garnishment, would sometimes be to expose an innocent man to the hazard of having to pay a debt twice. Be that so. Still, if the words of a Statute declare, without ambiguity, that such a debt may be reached by garnishment, such a debt must be held to be subject to garnishment; for when there is no ambiguity in the words of a Statute, the argument from the words, over-rides the argument from the effect and consequences.

Besides, *not* to permit such a debt to be reached by garnishment, would, itself, be any thing but an unmixed good. It would be to deprive creditors of what, in many cases, would be their only means of collecting their debts.

[1.] We think, therefore, that this, the first reason, was not a sufficient one to show the judgments of the Court below erroneous.

As to the second reason. It was not insisted that the Court below held that a debt secured by a negotiable instrument, was, after the instrument had been transferred, the subject of garnishment, in a suit against the assignor. The Court, doubtless, held the reverse. The difference between the Court below and the Counsel for the garnishees, seems

to have been as to the second branch of the reason—the inferential part; the Counsel insisting that the answers showed that the notes had been transferred before the garnishments were served—the Court considering that the answers did not.

In the case of King, the Court rendered a judgment against him, in respect to one of the notes only—that for $1161\frac{25}{100}$.

As to this note, the answer which King was finally prepared to make, and which he offered to make, substantially, was, that before service of the garnishment, the note had been transferred by Graybill, the debtor, to one Peddy, to secure Peddy against loss, on account of a securityship he was under for Graybill, on a note of Graybill's, for about $1500.

This answer the Court would not receive, considering it not to be such as would show that the garnishee "was not indebted to the defendant in the suit, the amount of" the note.

[2.] Was this refusal of the Court right? In other words, does the transfer of a negotiable note, as collateral security, carry the legal title of the debt to the transferee? It does. And that has been decided by this Court in two cases—*Gibson and another vs. Conner*, (8 *Kelly*, 47,) and *Hall vs. Page*, (4 *Ga. R.* 428.) Such a transfer, therefore, puts the note beyond the reach of a garnishment, at the suit of a creditor of the note; that is, if the transfer be made before the garnishment has been served.

The Court, therefore, should have allowed King to make the amendment to his answer, which he offered to make.

This disposes of the case of King.

Ells, the garnishee in the other case, answered that he was "well satisfied" that one of the notes, in respect to which he had been summoned as garnishee, had been transferred before he was so summoned.

Notwithstanding this answer, the Court gave judgment against the garnishee, in respect to this note.

Was this judgment right? It was certainly so, if the garnishee's answer amounted to an admission that he owed the debtor this note.

Now the garnishee's answer was not an admission of this,

if any value is to be attached to the *belief* of the garnishee. And we think that somewhat of value is to be attached to the belief of a garnishee.

Garnishment is but a substitute for a proceeding in Equity —a proceeding in which the belief of the answering party receives a degree of credit. If the defendant to a bill in Equity answers that he believes that an allegation, essential to the plaintiff's case, is not true, the plaintiff must prove that allegation before he can get a decree in his favor.

And whatever reason there is why this should be so in a proceeding in Equity, there is that it should be so in a proceeding, by garnishment, at Law. In either proceeding, the plaintiff makes the other party his witness.

Doubtless, in the proceeding in Equity, the plaintiff would have the right to call for the *grounds* of the other party's belief; and if they, when got, were not sufficient, in Law, to support that belief, to ask that the belief should be disregarded: and if they were sufficient, in Law, to support the belief, to ask for an opportunity to prove them untrue, in fact. And so, in the proceeding at Law by garnishment, the plaintiff would have the right to pursue the same course.

[3.] But in this case the plaintiff in garnishment took no exception to the answer, on the ground that it did not state the garnishee's reasons for his belief. He accepted the answer as it stood; and he thereby admitted, that it was true that the garnishee, himself, was "well satisfied" that he did not owe *to the debtor* the note in question. And this garnishee was a person who was his witness; and moreover, a person who had nothing to gain by stating a falsehood as to his belief, for he had admitted that he owed the note to somebody. In such a case, we think the presumption ought to be, that the garnishee has some good reason for his belief; otherwise, the plaintiff in garnishment would call for the reason. If we are right in this, the plaintiff ought not, in such a case, to be allowed to have judgment against the garnishee, without at least making up an issue with him on his answer; and on that issue, proving him to have no foundation for his belief. It is

the garnishee that, in such a case, ought to have the benefit of the doubt.

Indeed, I may say for myself, that if a garnishee does not distinctly *admit* that he owes the debtor money, or that he has something of the debtor's in his hands, no judgment can, in my opinion, be taken against him without the intervention of *a Jury*, unless the garnishee choose to waive the intervention of a Jury. If, in his answer, he barely says that he does not believe that he owes the debtor, &c.; or even if, in addition to this, he gives only some insufficient reason for his belief; still, I think he has the right to go before a Jury on the question, whether he does owe the debtor, &c. or not. This I think his right, under the law of Jury trial. And this, if a right, may be one of great practical value, for the garnishee, on an issue before a Jury, might be able to prove, beyond a doubt, what, without an issue, he could only conjecture. If the garnishee in this case, could have had a chance to examine the debtors themselves, before a Jury, he could have forced them to say the truth as to the negotiation of the note. They could have told what the truth was, and as witnesses on such an issue, they would have been forced to tell. The person who is sued in garnishment, by the creditor of his creditor, is not, it appears clear to me, in a worse situation than that in which he would be, if he were sued in the ordinary form, by his creditor himself. But if he were sued in the ordinary form by the creditor, himself, that creditor, could not get a judgment against him at all, unless he *confessed* a judgment to that creditor, or a Jury found a verdict for the creditor. Ought not the garnishee's answer, then, on which a judgment is to be entered up against him, to be of the nature of a *confession* of judgment? I think it ought.

No. 93.—ABNER P. POWERS, plaintiff in error, *vs.* THE CENTRAL BANK, defendant in error.

[1.] An Attorney who has collected money for the Central Bank, to whom the State of Georgia is indebted for fees, has a right to retain, in his hands, money sufficient to satisfy his claim; and on a motion made on the part of the Central Bank, to attach the Attorney for his failure to pay over the money so collected, he will be permitted to show that the State is indebted to him for professional services; and if this be shown, the same should be allowed as a credit or set-off against the demand upon which he is ruled.

Rule, in Bibb Superior Court. Decided by Judge HARDEMAN, May Term, 1855.

The following statement of facts in this case, was agreed upon and submitted by the parties:

The Central Bank ruled Powers for $534\frac{77}{100}$, collected by him as Attorney for the bank, which he admitted in his hands. To this rule, he pleaded and claimed a set-off of $300, with interest from October, 1843, due him by the State for professional services, which sum had been audited and liquidated. In the event the Court should hold that he was not entitled to interest, then he claimed that the set-off should be allowed to take effect at the time he collected and received the money for the bank, to wit: in 1852.

The Court decided that the debts not being mutual, the set-off or deduction could not be allowed.

To which decision of the Court, Counsel for Powers excepted.

WHITTLE, for plaintiff in error.

KENAN, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] We are not prepared to hold that the judgment below can be sustained upon the ground, that the claim of the

plaintiff in error was against the State, while the rule against him was for money collected for the Central Bank. The assets of the Bank having been transferred to the Treasury of the State, and consolidated with the public funds of the Government, out of which this debt, if due, Judge POWERS should properly be paid, (*Cobb's Digest*, 115,) the objection, as to the want of mutuality between the parties, can hardly be maintained.

We supposed, though not without doubt, (Judge STARNES reserving the right to dissent upon further examination of the authorities,) that the judgment was technically right upon another ground, namely: that an individual could not indirectly recover from the State a substantive, independent claim by way of set-off, any more than he could directly recover a debt due from the State by bringing a suit against her. We found the doctrine so laid down in *Bouvier*, (2 *Volume, Title Set-off*,) citing 9 *Peters*, 319. 4 *Dallas*, 303. 9 *Cranch*, 213, *and Paine's C. C. Reports*, 156, to sustain it. Being unable to refer to any of these cases, and the principle, itself, seeming to be reasonable, especially under our law of set-off, which allows a balance to be recovered by the defendant, we affirmed the judgment of the Circuit Court.

Candor constrains me to say, that upon a full examination in my office of the books, I am satisfied the weight of authority is the other way: *The Commonwealth against Matlack*, (in 4*th Dallas*,) fully sustains the position. It is inferentially maintained, perhaps, in the case of *The United States vs. Jacob Barker, in Paine's Reports.* The case of *The United States against Giles and others*, (9 *Cranch*,) stands thus: The third section of the Act of Congress, passed 1797, provides, that where a suit shall be instituted against any person indebted to the United States, the Court shall grant judgment at the return term, on motion, unless the defendant shall, in open Court, make oath or affirmation, that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the consideration of the accounting officers of the Treasury, and rejected, specifying

each particular claim so rejected in the affidavit. The next section declares, that in suits between the United States and individuals, no claim for a credit shall be admitted upon trial but such as shall appear to have been submitted to the accounting officers of the Treasury for their examination, and by them disallowed, unless it shall appear that the defendant, at the time of trial, is in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit by absence from the United States, or by some unavoidable accident. (See *United States' Statutes at large*, 1 *volume*.)

Now, under this law, the Supreme Court held, in *Gilet's* case, that no debtor of the United States could, at the trial, set off a claim for a debt due to him by the United States, unless such claim shall have been submitted to the accounting officers of the Treasury and by them rejected, except in the cases provided for in the Statute. Thus leaving, as it will be perceived, the general principle untouched.

The case of *The United States vs. Robertson*, (9 *Peters*) decided only that a claim for unliquidated damages could not be pleaded as a set-off by an individual against the Government, no more than it could in an action between individuals; and further, that the defendant could not plead as a set-off, a claim against the Government assigned to him by a third person. But the Court, in that case, say, that "when a defendant has in his own right an equitable claim against the Government for services rendered, or otherwise, and which has been presented to the proper accounting officer of the Government, who has refused to allow it, he may set up the claim as a credit in a suit brought against him for any balance of money claimed to be due by the Government."

So much for the precedents cited by *Bouvier*.

The United States vs. Macdaniel, (7 *Peters* 1) was an action of assumpsit brought by the Government to recover from the defendant the exact sum which, in Equity, it was admitted he was entitled to receive, for valuable services rendered to the public, in a subordinate capacity, under the express

sanction of the head of the Navy Department. This sum of money happened to be in the hands of the defendant; and the question was, whether he should, under the circumstances, be required to surrender it to the Government, and then petition Congress upon the subject. And the Court say, "a simple statement of the case would seem to render proper a very different course."

But whatever doubts may have previously existed upon the subject, they seem to have been removed by the opinion of the Supreme Court, in the case of *The United States against Wilkins, reported in* 6 *Wheaton*, 1. In that case the Court, speaking of the discounts allowed by the Act of 1797, (the provisions of which I have already quoted,) in suits brought by the United States, says: "there being no limitation to the nature and origin of the claim for a credit which may be set up in the suit, we think it a reasonable construction of the Act, that it intended to allow the defendant the full benefit, at the trial, of any credit, whether arising out of the particular transaction for which he was sued or out of any distinct and independent transaction which would constitute a legal or equitable set-off, in whole or in part, of the debt sued for by the United States. The object of the Act of 1797, seems to be to liquidate and adjust all accounts between the parties, and to require a judgment for such sum only as the defendant, in equity and justice, should be proved to owe to the United States. The defendant, therefore, may well claim a credit for the sums due him, even if they had grown out of distinct and independent transactions, for he is legally, as well as equitably, entitled to them."

It may be alleged that this decision was controlled, in some manner, by the Act of Congress which it expounds. But by examining the Act, it will be perceived that it gives no right, whatever, to plead a set-off, or use any discount, but regulates and restrains a right as already existing. The words of the law are not, that in such a suit, the defendant shall be allowed to plead a legal or equitable set-off, or to give the same in evidence; but that the cause shall be tried,

unless the defendant shall make oath "that he is equitably entitled to credits," &c; and that "no claim for a credit shall be admitted on trial, but such as shall appear to have been presented to the accounting officers of the Treasury," &c.

These words, we repeat, apparently give no right, whatever, but recognize a pre-existing right; and if it was a pre-existing right, it existed in other cases as well as in these contemplated by the Statute. And hence, the importance and applicability of all the cases which are cited from the Supreme Court Reports, notwithstanding they seem to turn more or less upon the Act of 1797.

But not to overlade this opinion with authority, I propose to refer to one more case, which covers the exact point, and is similar, in all of its features, to the case at bar, to-wit: *The United States vs. Mann*, reported in 2 *Brockenbrough*, 1.

This was a motion, on the part of the United States, to commit William Mann, late Deputy Marshal of the district, on an attachment for not paying over a sum of money levied by him on an execution issued from the Circuit Court, on a judgment obtained by the United States; and a motion, on the part of the said Mann, to discharge the said attachment, because the United States were indebted to him in a larger sum, for fees due to him as Deputy Marshal; which fees the Treasury Department had refused to pay. And Chief Justice *Marshall* held, that an officer of the United States, who has levied a sum of money on an execution, in favor of the United States, to whom the United States are indebted for fees of office, in a sum greater than the amount of the execution, has a right to retain it by way of set-off; and on a motion made on the part of the United States to commit the officer for failure to pay over the money so levied, he will be permitted to show that the United States are indebted to him; and if this be shown, it is a sufficient cause why he should not be attached.

The Chief Justice says: "The United States have not re-

quired their officers to labor for the Government gratuitously. The law acknowledges the obligation of the U. States to pay for services rendered in common with all others, for whom the same services may be rendered. The United States, it is true, are not subject to those coercive measures which may be employed against an individual; but the duty is the same, and the theory of the law is, that this duty will be respected. * * * On what pretext can the claim of the officer on the Government be rejected? The clearest principles of Law and Equity require that it should not be rejected; and if a Court be permitted to take jurisdiction of the subject, it cannot be disregarded, without disregarding, also, the soundest principles of law. The argument is the stronger, if the creditor, from any cause, cannot be coerced to pay the demand."

If we might presume so far, we would respectfully recommend the passage of a law, by our State Legislature, substantially the same as the Act of Congress of 1797, expressly allowing to defendants, when sued by the State, the privilege of pleading, by way of set-off or discount, any demand, legal or equitable, which they might have or hold in their own right, against the State, provided no judgment be rendered for any excess which might be found in favor of the defendant; or if found, that it do not operate as a lien on the public property, but only as record evidence of the indebtedness of the State for that balance.

NOTE.—Since writing out this opinion, application was made, by Counsel for the plaintiff in error, for the Court to review and reverse its own judgment; which was refused, upon the ground that the Constitution was imperative, that a *final* judgment should be rendered at the first term to which the cause was returnable, unless prevented by Providential cause.

The Attorney of the State then requested that the general doctrine enunciated in this opinion, might be modified by reference to the particular *facts* of this case.

After a careful examination of the facts set forth in the bill of exceptions, I am left in some doubt and uncertainty as to the truth of the matter. There

seems to have been some conflict of action between the officers of the Government, respecting this claim. Had it been passed upon by the Legislature, or by the Governor, the law having clothed him with the power of employing Counsel and paying their fees, there would be an end of the business; and the judiciary, in such case, would not assume to exercise jurisdiction in the premises. But the question is, has this been done?

My conclusion is, that this is a case for legislative rather than judicial, inquiry and determination.

No. 94.—SMITH L. TERRELL, plaintiff in error, *vs.* A. B. GODDARD, defendant in error.

[1.] As a general rule, each partner has an equal right to the possession of the copartnership effects. And if, upon a dissolution, they cannot agree as to the disposition of them, and one keeps, or endeavors to keep, the others from the possession or application of the same, a Court of Equity may appoint a receiver to collect and apply these effects.

[2.] But where the complainant does not clearly show that the defendant, his partner, is disposing of the effects contrary to his expressed wishes, or that he (the complainant) has offered to take any part in the disposition of the same, and that he has been opposed by the defendant; and where the defendant alleges the contrary of all this in his answer, without further proof, a Court of Equity should not appoint a receiver and take such effects from the control and disposition of the defendant.

In Equity, in Bibb Superior Court. Tried before Judge POWERS, May Term, 1855.

This bill was filed by William A. B. Goddard against Smith L. Terrell. The bill alleged, that on the 1st day of March, 1854, the parties entered into a co-partnership for carrying on a grocery eating establishment and billiard saloon, in the City of Macon; that complainant advanced $500 in cash; the defendant was to give his personal attention to the business, and receive one half of the profits, after complainant was re-imbursed the money he advanced; that certain arti-

cles, implements and utensils, such as the counter, cooking and eating apparatus, purchased with the separate means of complainant, should not be regarded as part of the joint concern; that complainant bought out a stock of goods and other effects used in a like business, from one John Barclay, amounting to some $2500—of which he paid, in cash, $500, and gave his notes, indorsed by Griffin McDonald, for the balance—one of which notes, for $771 $\frac{1}{100}$, was paid off by McDonald, and which has not yet been paid off by complainant or the firm; that goods, to the amount of $20.000, had been bought and sold by the concern, at a profit of 25 per cent.; that a large sum had been realized from the billiard saloon and eating establishment; that at the time of the dissolution of the partnership, all the books, accounts, notes, &c. went out of possession of the complainant, into the hands of defendant; and hence, he cannot annex a full schedule of sales and profits, &c.

The bill further charges, that complainant left the State in January, 1855, the stock and materials on hand being worth about $10.000, and notes, accounts, &c. amounting to some $5.000.

That on the 29th day of January, 1855, and soon after complainant left the State, the defendant, pretending that they had agreed to dissolve the partnership, published a notice to that effect, and sold and conveyed the stock of goods, &c. including the fixtures and articles belonging to the complainant individually; that there are debts outstanding against the firm, amounting to some $5.000; that the defendant made the assignment for his own benefit, and in fraud of the rights of complainant, and did not make any provision for the payment of the firm debts; that defendant has the possession of all the assets of said firm, and is using and appropriating them to his own use, and is insolvent; that he refused to pay the debts of the firm, or to render any account of the assets to complainant; that in the summer of 1854, defendant took with him $1000 to New York, with which to

buy goods, but has never accounted with complainant concerning the same.

The bill prayed that the said Terrell be enjoined from further using the partnership name, in settling the affairs of the firm; that a receiver be appointed to take charge of the assets, pay off the debts of the firm, refund to complainant the sum advanced by him before the defendant be allowed any thing as profits of the said partnership.

On the 22d day of March, 1855, Judge POWERS granted the injunction prayed for in the bill, and appointed Griffin McDonald receiver.

The defendant answered the bill—in which he admitted the partnership between the parties; that complainant bought the stock of goods, &c. of Barclay, for about $2000, paying $800 in cash, and giving his individual notes, with McDonald as indorser, for the balance; that when the first note, about $673, fell due, complainant having no money, the same was paid with the funds of the firm, and the note was to be held as partnership property. Defendant is unable to state the amount of profits realized from the concern. Complainant left the State, as charged in the bill, for the reason, that he was guilty of a crime involving his life, and that he is now a fugitive from justice; that complainant took and carried away with him various papers. such as invoices, bills and the $771 note belonging to the firm. The answer charges that the firm is insolvent, by some $1000 or $1500; defendant denies that he is appropriating the assets of the firm to his individual use; that after the commission of the act or crime alluded to by the complainant, the defendant sold out the stock of goods, &c. to Henry L. Ells, for $2000, for the benefit of the firm, to which course he was advised by the complainant. The answer denies that complainant had or owned any fixtures or articles in the said establishment, in his individual right. The defendant carried with him to New York about $900, which was expended for goods for said concern, and in payment of debts against the firm; the answer charges that complainant had used a large amount of the funds of the

concern, without accounting for the same. The answer charges that McDonald is a debtor instead of a creditor of complainant, and that they are combining and confederating to defraud the creditors of the firm.

Defendant prayed that the injunction might be dissolved, and the appointment of a receiver be annulled.

Upon the coming in of the answer, Counsel for the defendant moved the Court to dissolve the injunction and to annul the appointment of a receiver. The Court over-ruled the motion, and appointed a new receiver in the place of Griffin McDonald, upon the ground that he was an interested party, and defendant excepted.

POE, GRIER & POE, for plaintiff in error.

LANIER & ANDERSON, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] We recognize the general rule, that each partner has an equal right to the possession of the partnership effects. And that if, upon a dissolution, they cannot agree as to the disposition of the same, and one of the partners keeps, or endeavors to keep, the other or others from the possession or application of these effects, a Court of Equity, upon bill filed, may appoint a receiver for the purpose of collecting unsettled accounts, and applying such effects.

[2.] But we think that the case made before us does not fall within this rule. The complainant does not even show, by his bill, that Terrell, the defendant in the Court below, is disposing of the effects of the firm, in opposition to his expressed wishes or views, or that by himself, agent or attorney, he has proposed to take part in the collection and application of these effects, and that he has been prevented from so doing by Terrell; or that Terrell has offered opposition to him in any manner. And the answer of Terrell denies that he is proceeding against the rights, or contrary to the inter-

ests, of the complainant, or that the latter has "made any demand upon him for any of the property of the firm, or his individual property."

Under these circumstances, and without other proof of mismanagement by Terrell, or refusal, on his part, to allow the joint action of his partner, in receiving and disposing of the effects of this partnership, we do not see by what right a Court can proceed to take these effects from Terrell, and deprive him of all control in the winding up of his business; and therefore, we reverse the judgment of the Court on this ground.

No. 95.—JOHN A. LAVENDER *et al.* plaintiffs in error, *vs.* WILLIAM J. THOMAS *et al.* defendants in error.

[1.] Mortgages are not, within the Act of 1818, to prevent assignments, by debtors unable to pay all their debts, to some creditors in preference to others.

[2.] It is not unlawful for a debtor, who is unable to pay all his debts, to replace a note for more than thirty dollars, given for one of the debts, with notes for less than thirty dollars, although the effect may be to put the debt secured by that note ahead of the other debts.

[3.] A bill which seeks to have applied to the payment of the plaintiff's demand, exclusively, a fund in which all of the defendants have an interest, is not multifarious.

[4.] A bill prayed among other things, that a contract should be specifically performed: *Held*, that the parties to the contract were proper parties to the bill.

[5.] There are cases in which a person may, in Equity, be sued out of the county of his residence, as cases in which, otherwise, no decree at all could be rendered.

In Equity, in Houston Superior Court. Tried before Judge POWERS, May Term, 1855.

The bill alleges—

1. That, on the 17th Feb. 1852, Wm. J. Thomas and John A. Lavender purchased, jointly, of Reuben H. Slappey and Littleberry Mulkey, five acres of land in the 8th district, a part of No. 92, except the right of way for rail road.

2. A steam mill was then in operation on the five acres; price $2.700 in cash; but taken by Slappey; a note held by Lavender, on A. B. Dulin due 1st Jan. 1853, for $1.500, without any words of negotiability.

3. The note was endorsed by Thomas and Lavender, as guarantor, though it was to be Lavender's part of the purchase money.

4. Thomas and Lavender then executed joint notes to Slappey and Mulkey, for $1.370 93, due 1st Jan. 1853, including interest on payment for mill. Thomas signed first, individually, and then Lavender.

5. That for this consideration Slappey and Mulkey executed their deed, with certain timber privileges to Thomas and Lavender.

6. That immediately after said purchase, and before work with the mill, Thomas and Lavender took in Daniel W. Visscher as an equal partner.

7. That in five or six weeks after the first purchase, Thomas bought out the entire interest of Lavender, but took no deed from him—Thomas paying two hundred dollars in lumber, and assuming the payment of the $1.500 note of Dulin, and the $1.370 93 note, made by Thomas and Lavender to Slappey and Mulkey; Lavender, in the mean time, abandoning all control of the mill.

8. That during all this time, the title papers to the property remained in the possession of Thomas.

9. That after the purchase of Lavender's interest, Thomas had sole possession and control of the lot and mill, with the timber privileges; and made a contract with the rail road company to furnish stringers and cross-ties from Fort Valley to Flint River, ten miles; worth $6 or $8000 gross.

10. That Thomas then purchased of F. H. Cheever, all the saw timber on lot No. 69, and west half of lot No. 59, in the 8th district, and took a deed therefor.

11. That Thomas also purchased of Cheever, timber, of the same kind on 200 other acres of land, the deed to which has been lost or mislaid.

12. That the purchase from Lavender, and of the timber from others, was for the joint use and benefit of Thomas and Visscher, who remained in quiet and excluisve possession, with the consent of Lavender, until Sept. 1, 1852, when Thomas, for himself and Visscher, re-sold to Lavender all his former interest in the five acres, except the right of way. The timber and grist-mill, which had been since added, were included in the re-sale to Lavender, upon the understanding between Thomas and Lavender, as follows:

First. That Lavender was to protect and save, harmless, Thomas on the Dulin note guaranty, and on the joint note to Slappey and Mulkey; both given for the five acre lot and mill.

Second. That Lavender was to have the contract with the rail road for stringers and ties.

Third. That Thomas was to continue to hold the titles to the property, as an equitable surety for the payment, by Lavender, of the two notes for $1.500 and $1.370 93.

Fourth. That when Lavender paid off these two large notes, and also $450, which Thomas had paid for the grist-mill and timber privileges, then Thomas was to convey to Lavender the five acres, the steam saw-mill, the grist-mill, and all the timber privileges.

13. That immediately after this bargain with Lavender, he took possession of all the property and used it, realizing on the rail road contract $3.000 or other large sum, besides $1.000 worth of lumber sold to other persons.

14. That Lavender continued to possess and use the mills and other property as his own, until May or June, 1853, when both mills were burned down from the carelessness of Lavender, his agents or servants.

15. That the burning of the mills changed the situation of the premises, and rendered the balance of the property of but little value.

16. That other dealings had taken place between Thomas and Lavender, when, on January 25, 1853, Lavender executed his note to Thomas for Six Hundred and Fifty Dollars, due one day after date.

17. That Thomas had tendered to Lavender, a conveyance for all the mill property and timber privileges, if Lavender would take up or discharge Thomas from the notes for $1.500, and $1.370 93, which he, Lavender, has wholly failed to do.

18. That, by process of law, and for his own safety, Thomas has been compelled to pay off the $1.370 93 note.

19. That Thomas and Visscher are ready and willing, and offer to convey said 5 acres and the timber, upon Lavender's re-imbursing the payments on said notes.

20. That after the burning of the mills, Lavender recognized and claimed the land, mills and timber.

21. That in June, 1853, he was about to remove himself, family and property, beyond the State of Georgia, when Thomas, having previously paid off both the large notes, sued out bail process against Lavender on the $1.500 note, and also on other demands, under which process Lavender was committed to Crawford jail.

22. That about the time of said bail proceeding, Thomas sued out attachments against the property of Lavender, which were dismissed for irregularity.

23. That previous to suing out said bail process and attachment, Lavender had caused a considerable portion of property that he claimed, and had in possession, to be removed to Texas, so that when said process issued, he had no property in Georgia, within the knowledge of Thomas, except the 5 acres of land, the remains of the mill after burning, one negro man, the mill-carts, wagons, &c. horse and buggy, of not much value, and a large two-story house, and the lots thereto attached, in Fort Valley, whereon Thomas now resides.

negro has been sold for $800, under Dickinson's *fi. fa.* and the money is now held up in the Sheriff's hands in Houston County.

37. That Thomas has been at trouble and expense worth $400 or $500, in pursuing and bringing back said negro Joe, and but for his diligence the said negro would not have been placed within the reach of the Sheriff of Houston County. During all which time Dickinson took no active steps to secure himself, but profited by the diligence of Thomas, which the Court ought not to allow him to do.

38. That after Thomas had attached and taken out bail process, Carver & Johnson, combining with Lavender, procured a debt due them to be split up into small notes, which were sued in Justice's Court, and judgment and execution obtained, on which the fund in Court will be claimed, in fraud of the rights of Thomas.

39. That Hindsman has filed his bill, returnable to April Term, 1854, of Houston Superior Court, against R. H. Slappey, J. A. Miller and others, to fix a lien on the money in Court, and have it applied to the mortgage or small *fi. fas.* of Hindsman against Lavender.

The prayer of the bill is, that all claims, judgments, *fi. fas.* mortgages, and every pretended lien adverse to the rights of Thomas may be set aside; that Sargeant account to Thomas for the true value of the mill, property and timber bought in by him fraudulently; that the funds in Court from the sale of the house and lot and from the negro Joe, be held up until Thomas can get a decree against Lavender upon his equities, and the funds to be paid over to him, &c. &c.

To this bill the defendants filed a demurrer, upon the following grounds:

1. Because there is no equity in the bill.
2. Because complainants had an adequate Law remedy.
3. Because the bill is multifarious.
4. Because Visscher is improperly made a party.
5. Because the Court has no jurisdiction over the persons

of the defendants, Hindsman, Sargeant, Dickerson and Carver & Johnson.

6. Because there is no equity in the allegations touching the burning of the mills.

7. Because there is no equity in the allegations against Cheever and Kendrick.

8. Because the allegations against Hindsman, are vague, uncertain and fishing in their character.

9. Because there is no equity in the allegations touching the claims of Dickerson or Carver & Johnson, and they are improperly made parties.

After hearing argument, the Court sustained the demurrer as to the defendants, Harrison J. Sargeant and Samuel F. Dickerson, and ordered their names to be stricken from the bill, and over-ruled the demurrer, as to all the other defendants, and Counsel for defendants excepted.

MILLER & HALL; STUBBS & HILL, for plaintiffs in error.

SCARBOROUGH, for defendants in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] This Court has in two cases decided that the Act of 1818, to prevent assignments to some creditors in preference to others, does not affect mortgages made to secure a just debt. (*Lee and others vs. Brown and others*, 7 *Ga. R.* 276. *Davis and others vs. Anderson & Bro.* 1 *Kelly*, 176.) To these decisions I give my assent; but it is not without much difficulty that I do so. There is certainly ambiguity in the words of the Act.

The Act being interpreted by these decisions, it follows that the mere execution of the mortgage to Hindsman and Sergeant by Lavender, as stated in the bill, was not a violation of the Act.

The bill, however, states other objections to these mortgages.

To the mortgage of Hindsman, the objection stated is, that the debt secured by the mortgage was not *bona fide* real or substantial, but was made, or pretended to be made, after the arrest of Lavender, and while he was in prison, for the "express purpose of covering up, concealing, cloaking and screening the" house and lot mortgaged, from the debt of Thomas; "that if the debt to Hindsman ever had any real *bona fide* existence, it was in a large note or notes above the jurisdiction of a Justice of the Peace; and that after the imprisonment of Lavender, he and Hindsman, for the express object, purpose and deliberate intent to cover up and conceal all the property of the said Lavender from orator Thomas' claim, combined together to defeat and defraud orator Thomas; and for that purpose, split up and severed the said large note or notes, and then gave the mortgage."

This statement is a very uncertain one. The former part of it, however, the part alleging the non-existence of any real debt, has equity in it; and although this part may be in the alternative with the latter part, yet, as under the late Act of Amendments it is amendable, as a matter of course, we will only say that the Court below ought to require it to be amended; and ought, if it is not amended, to dismiss the bill, as to Hindsman.

For in the alternate part of the statement, there is, as it seems to us, no equity. We are not aware of any law which prevents a debtor, unable to pay all his creditors, from "splitting up" a large debt into small ones, so as to enable the holder of that debt to obtain judgment in a Justice's Court sooner than the other creditors who have to sue in the higher Courts may be able to obtain judgments on their debts, and thereby, to enable that debt to get a preference over these. The Act aforesaid, of 1818, is not such a law. That prohibits *assignments*, and assignments only. Equity does not forbid an insolvent debtor to prefer one of his creditors to another. (*Stor. Eq.* §370.) And then, the Act of 1801, amending the Judiciary Acts, as far as they relate to Justice's Courts, gives its express sanction to such a division or

"splitting up" of a large debt as shall bring the debt within the jurisdiction of a Justice's Court.

[2.] The mere fact, then, that Hindsman's debt was "split up," so as to be brought within the jurisdiction of a Justice's Court, was not a fact in which there was, in the opinion of this Court, any equity.

The objections to the other mortgage, that of Lavender to Sargeant, it is needless to consider, as the Court sustained the demurrer as to Sargeant.

[3.] This bill was not multifarious. All the defendants had an interest in the fund in the hands of the Sheriff. The object of the bill was to get that fund applied to the payment of the complainant's debts, in preference to the debts of any of the defendants. The manner in which this fund was to be applied, was a matter that concerned all of the defendants. If so, the bill was not multifarious. *Booth and another vs. Stamper*, (10 *Ga. R.* 116.)

Visscher was a proper party plaintiff to the bill. One of the objects of the bill was to compel Lavender to perform his contract of purchase of the mill, &c. Visscher was joint owner of the mill, &c. with Thomas when Thomas sold them to Lavender. The bill containing a prayer that Lavender, the vendee, should perform what was to be done on his side of the contract, would have, also, to contain an offer by his vendors to perform what was to be done on their side. That there might be such an offer, Visscher, who was owner of the mills, &c. jointly with Thomas, and one of the vendors, had to be a party to the bill. Visscher was a party to the contract for the specific performance of which the bill prayed.

Was the Superior Court of Houston County, the Court which had jurisdiction of the case?

The defendants, with the exception of Lavender, resided in other counties than Houston, and he resided in Texas.

The great object of the bill is, to have the fund which is in the hands of the Sheriff of Houston applied in a particular way. It is true that no subpœna is prayed against the Sher-

iff of that county; but the omission of such a prayer against him may have been an inadvertence. A decree is prayed against the fund in his hands. At all events, he may still be added as a party.

Considering the bill, then, as if he were a party to it. We answer the question, by saying that the Court in Houston was the Court which had jurisdiction of this case and of the defendants, although most of them resided, not in Houston, but in other counties.

In *Gilbert vs. Hardwick*, (3 *Kelly*, 575,) this Court say, that "Equity cases are not embraced in the term 'civil cases,' as used in sec. 1, art. 3 of the Constitution." In *Rice vs. Tarver*, (4 *Ga. R.* 582,) they re-affirm this. In the cases of *Jordan vs. Jordan and others*, 12 *Ga. R.* 78, 15 *Ga. R.* 76, 16 *Ga. R.* 446,) there is nothing said by the *Court*, adverse to this position. In the last of these cases I, for myself, express a doubt as to whether the expression, "civil cases," used in the Constitution, does not include Equity cases. I still entertain that doubt, but I cannot, upon a doubt, dissent from the majority of the Court, supported, as they are, by two decisions of this Court and many decisions, (as I am aware,) of the Superior Courts.

[5.] Still, although the words, "civil cases" may not, as used in the Constitution, include Equity cases, yet, under the maxim that Equity follows the Law, Equity cases will generally have to be brought in that county only in which the defendant resides. There may, however, be Equity cases in which it will be impossible to observe the maxim—as cases in which more parties than one are necessary to any decree, and those parties, some of whom reside in one county and some in another. And this case is such a one; for in this case no decree, disposing of the fund in the hands of the Sheriff, can be rendered, unless the case in which it shall be rendered shall be such a case as shall bring some one or more of the persons interested in the fund out of his county, into the county of some other of the persons interested in it.

That being so, the best county in which to bring this suit,

was the county in which the suit was brought. In that county resided the person who had the fund in his hands, and who was Sheriff of the county, and who, as Sheriff of the county, held the fund. To require a Sheriff to leave his county to answer a suit, is to require him, for a time, to lay aside his public as well as his private business; and that time may happen to be one when a Court of his own county is sitting, or one which, for some other cause, calls imperiously for his presence in his own county.

The only objection which the bill states to the demand of Carver & Johnson is, that it had been "split up" into smaller demands, that it might be brought within the jurisdiction of a Justice's Court. This, as we have already seen, was not a good objection.

We think, therefore, that the Court should have sustained the demurrer, so far as Carver & Johnson were concerned.

And this disposes of the case.

No. 96.—THE MACON & WESTERN RAIL ROAD COMPANY, plaintiffs in error, *vs.* JAMES M. DAVIS, administrator of Willis Boon, deceased, defendant in error.

[1.] When a plaintiff declares, as executor or administrator upon a cause of action arising in the lifetime of his testator or intestate, and makes profert of the probate or letters of administration, the defendant cannot, at the trial, deny the title of the plaintiff, as executor or administrator, unless there be a plea of *ne unques executor*, or *ne unques administrator*.

[2.] Where a plaintiff declares on a cause of action arising in his own time, and makes profert of the probate or letters of administration, and the defendant pleads the general issue, such plea does not admit the plaintiff's title as executor or administrator.

[3.] Where the executor or administrator has been in *actual* possession of the property which is the subject of the suit, it will not be necessary for him to give evidence of his title, as executor or administrator, in an action

against a wrong-doer; and in such case, the naming him executor or administrator, in the declaration, may be regarded as mere surplusage.

[4.] Where, however, the plaintiff declares upon his constructive possession, he must show his title at trial.

[5.] The proprietors of rail roads, when running their engines over crossings, must use reasonable care and diligence, taking into consideration all the circumstances of the case; and whether there has been negligence or not, depends upon the facts of each particular case, and the question is to be decided by the Jury; and, notwithstanding the plaintiff may not be without fault, still, if the injury could have been prevented, in the exercise of proper and reasonable precaution on the part of the defendant, and was not, the defendant will be liable.

Case, in Bibb Superior Court. Tried before Judge Powers, May Term, 1855.

This was an action on the case, brought by the defendant in error, James M. Davis, as administrator of Willis Boon, deceased, against the plaintiff in error, to recover the value of a negro man slave, and a rockaway carriage.

It appeared in evidence, that on the 14th day of December, 18—, the engine and cars of the defendant run over and killed and destroyed the said slave and carriage, at a public crossing over said rail road, at or near Prattsville, in the County of Monroe. It further appeared, that Mrs. Winn, who was in the carriage at the time, with her four children, saw and heard the train of cars before the carriage reached the crossing; and when she got near it, directed the driver to stop until the train passed; the driver refused to stop, and attempted to cross before the train. The mules attached to the carriage stopped on the rail road track and refused to move; and in that situation, they were run over by the engine. It also appeared in evidence that the engine and train were going at full speed when Mrs. Winn saw it approaching; that it was going an up-grade, and that the carriage could have been seen two hundred yards, as it approached the crossing. If the driver had obeyed the instructions of Mrs. Winn to stop, the injury would not have occurred.

Plaintiff failed to prove that he was the administrator of Willis Boon, to whom the negro and carriage belonged, though it was alleged and proved that the injury happened after the death of the intestate.

Plaintiff in error filed the following assignment of errors upon the bill of exceptions:

1st. The Court erred in refusing to charge the Jury, that the plaintiff could not recover without proving that he was the administrator of Willis Boon, deceased.

2d. In instructing the Jury that if the carriage of plaintiff, in passing along the highway, was voluntarily stopped, and blocked up that portion of the road crossed by the rail road, then it was not rightfully on the road.

3d. In instructing the Jury, "that the conductors and engineers are bound to use the utmost skill and diligence to prevent accidents at crossings; and if, by their negligence, an injury happens, such negligence is gross and the company are liable."

4th. In deciding and instructing the Jury, "that in view of the great danger attending the running of cars and engines, the care and skill in conducting them must be in proportion to the danger."

5th. In instructing the Jury, that "it is the duty of the defendants, when approaching a public crossing, to have the engine and train under the control of its managers, so that if persons are there, it is possible to stop; and if, from any cause originating in their management, a public crossing is approached with an uncontrollable engine and train, the negligence is gross, and the company are liable."

6th. In instructing the Jury, "that it was the duty of the engineer so to manage and check his engine as to have it under his control, so that he could stop it and prevent its running against the carriage while on the road; and if, for any cause, this was impossible, it was the duty of the defendant to prove such impossibility; and if they have not, they are liable."

7th. The Court erred in failing, altogether, to state the evidence of the defendant in summing up the evidence to the Jury.

8th. That the instructions of the Court to the Jury, upon the skill and diligence necessary to be exercised by the defendant in the action, are contradictory.

9th. The Court erred in deciding that the name of Thomas Dougherty should be stricken from the Grand Jury list before striking, because he was in the employment of the company in their workshop, but not on the road.

10th. The Court erred in refusing to allow defendant's Counsel to argue that plaintiff had failed to make out his case, because he had failed to prove that he was the administrator of Willis Boon.

11th. The Court erred in instructing the Jury, "that greater care was necessary in crossing near a church;" there being no evidence that this crossing was near a church.

COLE; NISBET, for plaintiffs in error.

WHITTLE; S. T. BAILEY, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

The first exception being waived as to the rejection of the Juror, Thomas Dougherty, for cause, and the last, also, as to the failure of the Court to sum up, fully, we proceed to notice the remaining assignments of error.

[1.] As the plaintiff failed to show that he was in the actual possession of the property for the injury to which the suit was brought, and relies upon constructive possession only, he was bound to prove his title on the trial. Such was the opinion of this Court in *Robinson against McDonald*, (2 *Kelly*, 116,) and such is the well established doctrine of the books upon this subject.

Where the plaintiff declares, as executor or administrator,

upon a cause of action, arising in the time of his testator or intestate, and makes profert of the probate or letters of administration, the defendant cannot, at the trial, deny the title of the plaintiff as executor or administrator, unless there be a plea of *ne unques executor* or *ne unques administrator*.

[2.] But where the plaintiff declares on a cause of action *arising in his own time*, and makes profert of the probate or letters of administration, and the defendant pleads the general issue, such plea did not formerly, nor until the rules adopted during the reign of IV*th William*, admit the plaintiff's title as executor or administrator.

[3.] Where the executor or administrator has been in the *actual* possession of the property which is the subject of the suit, it will not be necessary for him to give evidence of his title, as executor or administrator, in an action against a wrong-doer. And in such case, the naming himself executor or administrator in the declaration, may be regarded as mere surplusage.

[4.] However, where the plaintiff declares upon his *constructive* possession, as executor or administrator, he must show his title at the trial.

These are the general rules deduced from *Mr. Williams on Executors* and other elementary works upon pleading. And inasmuch as Mr. Davis sued, as the administrator of Boon, for damage done to the property in his own time, and made profert of his letters, he was bound to make out his case by exhibiting his authority, there being no proof that the property was in his possession at the time the injury accrued. And he was not relieved from this necessity, because the defendant's Counsel omitted to take this point in his opening speech, as it was his duty to have done, when the defect could have been readily cured. We do not say that it might not have been done at any time thereafter; at any rate, before the the Jury retired to consult upon their verdict.

[5.] But the main question to be considered is, by what rule of law shall the rights of this and all other plaintiffs in

like cases, and the liability of this and all other rail road companies be determined?

A great many requests to charge were made of the presiding Judge by each party, which were given, refused or modified according to his opinion of the law. And we avail ourselves of this occasion to suggest, that the practice of asking the Court to sub-divide a simple principle into innumerable parts, and to give separate instructions upon each, tends greatly to mar the symmetry of the law, as well as to mystify and embarrass the case. Here is a question, the whole law of which can be stated in a few lines, which is drawn out into a dozen or more parcels, covering as many closely written manuscript pages. Such a practice does harm every way; and instead of giving aid and assistance to the Jury in their deliberations, it tends only to make "confusion worse confounded."

We take the doctrine to be this: that the proprietors of rail roads, when running their engines over crossings, are bound to exercise *reasonable* care and diligence, to prevent injury therefrom to travellers and other things on the road, crossed; and that whether such care and diligence have been employed in a particular case, is a question of fact, to be decided by the Jury, upon all the circumstances. This rule commends itself, as well on account of its simplicity as the universality of its application, and it is the only one which can be prescribed by the Courts. They have tried in vain to be more definite and to classify the degrees of diligence; but the attempt has been abandoned as impracticable.

It is true, that what will amount to reasonable care and diligence at a crossing, in a retired place and on a straight line in an open country, would be considered the grossest negligence in turning a curve, especially if at a crossing in the neighborhood of a church or other public place. To dash through the town of Griffin at the same speed that might be safely pursued a few miles distant, would exhibit a degree of recklessness from which even malice might be inferred, should human life be sacrificed. The rule of diligence

will vary, therefore, with the everchanging facts which accompany and surround each given case; the true test, always to be applied, being—did the defendants use reasonable diligence; that is, the care and diligence which, taking into consideration all the circumstances of the case, the exigency required and admitted of?

When, therefore, the Circuit Judge charged the Jury, that the company was bound to the "*utmost diligence;*" and, that to this end the conductors and engineers must hold their trains in check, so as to be able to stop them at *all* the crossings, to avoid collisions, we think he stated the rule too strictly. The doctrine of *extreme* diligence applies to the transportation of passengers; and such are the cases read by Col. Bailey; but it does not apply to this class of cases.

The casualty in which this action originated, occurred on the 14th day of December, 1851. The Legislature, being then in session, passed, forthwith, the following Act, the provisions of which our rail road companies would do well to take heed to. The first section declares—

"That the several rail road companies in this State shall be required, by the first day of February next, thereafter, to prepare and put up, in a substantial manner, sign-boards, parallel with the track, and over each and every public road, where the same crosses the rail road track, and sufficiently high to allow the passage under them of any vehicle commonly used upon said roads; and to have painted in large letters, on each side thereof, "Look out for the engine when the whistle blows."

The second section enacts: "That each of said companies shall cause to be fixed on the line of their track, and at the distance of two hundred yards from the centre of each public road, on each side of said road, a post; and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the engine until the engine arrives at the public road; and shall, moreover, be required to check the speed of said engine, so as to enable him to stop said engine should any person or thing be crossing said track,

on said public road." (*Pamphlet Acts of* 1851–'2, *p.* 108, 109.)

And should any company fail or neglect to put up the sign-boards and posts required by the first section of the Act, the president and directors thereof are each guilty of a misdemeanor; and upon indictment and conviction thereof, in the county where such failure occurs, shall each be subject to a fine of not less than five hundred, nor more than one thousand dollars; and upon failure of the engineer to comply with his duty, as prescribed by the Statute, he is liable to be punished by fine or imprisonment, or both, at the discretion of the Court; the company also being made liable for the payment of the fine. (*Ib.*)

Of course this law does not apply to the present case. It may be well to observe, however, that all the roads in this State will be bound to comply, at their peril, with the positive regulations prescribed by this Act; and failing to do so, they must take the consequences, both civilly and criminally. It may be further remarked, that on the other hand, even a compliance with these regulations will not exempt the companies from the obligation of using reasonable care and diligence in other respects, when the circumstances rendered it both practicable and right to use other precautions.

But it is insisted, that if the injury in this case resulted, in whole or in part, from the misconduct of the plaintiff's servant, that he cannot recover; and this seems to have been the rule laid down in *Butterfield vs. Forrester*, (11 *East.* 60,) and *Luxford vs. Large*, (5 *Car. & P.* 421, 24 *E. C. L. R.* 391.) But this doctrine has been modified in later cases; and in *Lynch vs. Nurdin*, (1 *Adol. & Ell. N. S.* 29, 41 *E. C. L. R.* 422,) it was held that the defendant was liable in an action on the case, though plaintiff was a trespasser, and contributed to the mischief by his own act. And this case has been followed in *Robinson vs. Cane*, (22 *Vermont R.* 213,) and *Birge vs. Gardiner*, (19 *Conn.* 507,) and numerous other adjudications in this country. We approve of this modification of the principle, and think that it ought to be

left to the Jury to say whether, notwithstanding the imprudence of the plaintiff's servant, the defendants could not, in the exercise of reasonable diligence, have prevented the collision. The place of crossing, its propinquity to the church, the relative positions of the roads, the intervening obstructions, the time of the day, the weight and velocity of the engine, the grade of the road—these and every other explanatory fact, should be referred to the Jury; and although it may have been rash in the boy to attempt crossing ahead of the train, but which he failed to do, probably on account of the sudden terror of his team, still, if by reason of an ascending grade and other circumstances, it was in the power of the engineer to have stopped the train, and prevented the mischief, it will be competent for the Jury to make the company chargeable.

No. 97.—URIAH C. SAMPLE, administrator, *et al.* plaintiffs in error, *vs.* HARRIET LIPSCOMB, administratrix, defendant in error.

[1.] Every fact or circumstance serving to elucidate or throw light upon the issue being tried, constitutes proper evidence in the case.

[2.] Administrators or executors, plaintiffs in an action, are bound by their admissions in relation to the subject-matter of the suit. If they injure the estate by these, they are answerable thereto. But third persons must be protected in acting on them, certainly, in all suits instituted by the administrator or executor.

Assumpsit, in Troup Superior Court. Tried before Judge BULL, May Term, 1855.

This was an action of assumpsit, brought by Harriet Lipscomb, administratrix of Nathan Lipscomb, against Uziah C.

Sample, administrator of Wm. M. Sample, deceased, and James A. Sample, on the following note:

"By the 25th day of December, 1851, we promise to pay Nathan Lipscomb, or bearer, the sum of Three Hundred and Thirty-three Dollars and Thirty-three Cents, for the timber on five hundred acres of land, to-wit: numbers 52, 51 and 39, lying in the 14th district of originally Carroll, now Heard County, it being the last payment for said timber. For value received, this 31st December, 1849.

WILLIAM M. SAMPLE,
JAMES A. SAMPLE."

The defendants, among other things, pleaded, "that in the year 1849, a partnership was formed and entered into by Nathan Lipscomb, William M. and James A. Sample, to run a steam saw-mill, and that this note sued on was a partnership transaction; that the partnership affairs had not been settled, no account ever having been taken; and further, that the said Lipscomb paid this note sued on, into the partnership concern, as a part payment of his one third part of the expenses in erecting said mill and running the same, which he agreed and promised to furnish and advance."

On the trial, Counsel for plaintiff offered the note in evidence and closed his case.

The Counsel for defendant then offered in evidence articles of agreement and partnership, for the erection and running of a steam saw and grist-mill, between Nathan Lipscomb, William M. and James A. Sample, dated the 1st day of November, 1849, in which, among other things, it was stipulated, that the said Lipscomb "agreed that the notes given him by William M. and James A. Sample, for two thirds of five hundred acres of timber, shall be shoved off at or on the best terms they can be, and the money is to pay said Lipscomb's one third part of the expenses in the mills; said Lipscomb does not bind himself to pay any more money for the erection

of said mills than what may be got for the said notes on William M. and James A. Sample," &c.

To the introduction of this paper, Counsel for plaintiff objected; and it was submitted to the Court whether, under any state of facts involved in the case or presented by the pleas, it could be evidence. The Court sustained the objection, and Counsel for defendants excepted.

Counsel for defendant then offered to give in evidence the admissions and statements of Mrs. Harriet Lipscomb, in substance, as follows: "that after the death of Lipscomb, she expressed a desire to have the mills completed and to pay her part of the expenses; that she would, as administratrix, have the note (sued on) appraised, but would account to the defendants for the note in a general settlement of the mill affairs." To the admission of this evidence, Counsel for plaintiff objected.

The Court sustained the objection, and Counsel for defendant excepted; and upon these exceptions errors have been assigned.

BIGHAM, for plaintiff in error.

B. H. HILL, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] It is our opinion, that though, perhaps, it cannot be said accurately that the instrument offered in evidence, and ruled out by the Court, served to show in what manner the note before the Court was to be paid, as was insisted on by the Counsel for the plaintiff in error; yet, that it did serve to prove the nature of the partnership, and may have served to account for the manner in which the note was given up by Lipscomb to the other partners, as was alleged in the plea, and to explain how it may have been delivered in payment of

his share of expenses, and permitted to remain in the hands of W. A. Sample, as a mere partnership memorandum.

In this point of view, it may serve to elucidate or throw light upon the transaction. And we know that every fact or circumstance having this effect upon the issue being tried, constitutes proper evidence in any case.

We think that the Court erred, therefore, in rejecting this instrument.

[2.] We are also of opinion, that the Court erred in holding that the admissions of the plaintiff, as administratrix, did not bind the estate, and was not proper evidence in this case.

Administrators or executors, plaintiffs in an action, are bound by their admissions, in relation to the subject-matter of the suit, and they make them at their peril. They may injure the estate by making these improvidently; but the consequences must be between them and the estate. These admissions must be acted on by third persons with whom they deal, and must be held binding on those who make them, certainly, in all suits instituted by them. *Hill vs. Buckminster*, (5 *Pick.* 391.)

Any other rule would most unjustly place every one having dealings with these trustees, entirely at their mercy.

Let the judgment be reversed.

No. 98.—JOHN W. MURPHY, plaintiff in error, *vs.* JOHN S. WINTER & Co. defendants in error.

[1.] [2.] A citizen of another State, passing through this, may be sued in this, and in any county of this State in which he may happen to be at the time when sued.

[3.] M made a bail affidavit for J S W & Co. in which he stated himself to be their agent. They filed their declaration in their own names, by their Attorney, and founded it on that affidavit: *Held*, that this was evidence that they had authorized M to make the affidavit.

Debt and bail, in Troup Superior Court. Tried before Judge BULL, May Term, 1855.

This was an action of debt and bail, brought by J. S. Winter & Co. against John W. Murphy, on a due bill for $800.

At the trial on the appeal, Counsel for defendant moved the Court for a continuance, to allow him to file a plea to the jurisdiction of the Court, stating that the defendant resided in the State of Alabama, and was merely passing through Troup County when he was sued; that he did not know the reason of the absence of the defendant from Court; and that he had expected him to be present. The Court refused the continuance, and Counsel for defendant excepted.

Counsel for defendant then moved the Court to dismiss the bail, on the ground that the affidavit, to hold to bail, had been made by one Michaeloffsky, as agent for plaintiffs, he furnishing no other evidence of his agency for plaintiffs but his own declarations in the affidavit; and stating therein, "that one John W. Murphy, who, as deponent is advised and believes, is now (when the oath was taken) of the County of Troup, and owes plaintiffs the amount sued for, besides interest, which said amount is claimed to be due," &c.

The Court over-ruled the motion, and Counsel for defendant excepted, and upon these exceptions errors have been assigned.

BIGHAM, for plaintiff in error.

B. H. HILL, for defendants in error.

By the Court.—BENNING, J. delivering the opinion.

Can a citizen of Alabama be sued in this State, as he passes through it?

[1.] Undoubtedly he can. The second of the axioms of *Huberus*, as translated by *Story*, is: "that all persons who

are found within the limits of a government, whether their residence is permanent or temporary, are to be deemed subjects thereof." (*Stor. Conf. Laws*, §29, *Note* 3.)

[2.] If he is liable to suit in the State, what county is it in which the suit is to be brought? That county in which he resides at the time when the suit is brought. And a citizen of another State, who is merely passing through this, resides, as he passes, wherever he is. Let him be sued, therefore, wherever he may, he will be sued where he resides.

The plaintiff in error, although a citizen of Alabama, was passing through the County of Troup, in this State, and whilst doing so, he was sued in Troup. He was liable to be sued in this State, and in Troup County of this State.

The plea, then, if it had been put in, would have been worthless. Of course, therefore, the Court was right in refusing a continuance, asked for to enable the defendant to prove such a plea.

The motion to dismiss the bail was put upon the ground, that the affidavit was made by Michaeloffsky, as agent of the plaintiffs, and that there was no evidence to show him to be such agent, except his own statement to that effect, in the affidavit.

There was, however, other evidence. The suit itself was that evidence. The suit was the suit of the plaintiffs themselves, by their Attorney at law, and it was founded on the bail proceeding. It, therefore, was a thing from which a strong inference was to be drawn, that they had authorized the bail proceeding.

[3.] In the face of such an inference, with nothing to rebut it, the Court was right in over-ruling the motion to dismiss the bail.

No. 99.—SAMUEL A. DURAND, plaintiff in error, *vs.* THOMAS W. GRIMES, defendant in error.

[1.] It is too late, after the defendant has pleaded to the merits of the action, and the cause has been submitted upon the appeal, for the defendant to demur to the declaration, upon the ground that the plaintiff, who sues as a physician, has not alleged in his writ that he was licensed to practice medicine.

[2.] Plaintiff's books of account, containing the original entries, should be produced and proven in the usual way, unless the evidence shows that the services were actually rendered for which the action is brought.

[3.] It is no objection to a charge, that it does not go far enough, provided it states the law correctly as far as it goes.

Assumpsit, in Troup Superior Court. Tried before Judge BULL, May Term, 1855.

This was an action of assumpsit brought by Dr. Thomas W. Grimes against Samuel A. Durand, on an open account for sixty-five dollars, for medical services and medicine rendered and furnished a slave of the defendant.

The defendant pleaded the general issue.

On the trial, Counsel for the defendant excepted to plaintiff's declaration, on the ground, that "it contained no allegation that the plaintiff was legally licensed to practice medicine at the time the services were rendered;" the only allegation to that point being, "that the defendant was indebted to plaintiff for services and medicines used and employed by said plaintiff, as a practising physician."

The Court over-ruled the exception, and Counsel for defendant excepted.

Plaintiff then offered in evidence the answers of several witnesses to interrogatories, in substance, "that they were acquainted with Dr. Grimes; had employed him for many years as a physician; and that he kept correct books of account," &c. To the admission of which, Counsel for defendant objected, on the ground that the plaintiff must first show

that he is a licensed physician, or falls within some one of the exceptions made by the Statutes of Georgia. The Court over-ruled the objection, and Counsel for plaintiff excepted.

Plaintiff then offered to read the answers of Robert A. Ware, in substance, that he had compared the account sued on with the book of accounts of Dr. Ware, and found that they corresponded; that he was informed by Dr. Ware, himself, that the book with which he compared the items of account, was his medical account book."

Counsel for defendant objected to this testimony. The Conrt over-ruled the objection, and defendant excepted.

Plaintiff then offered in evidence the depositions of Dr. Boswell, who testified that the charges made in the account sued on, corresponded with the fee bill established by the physicians of Columbus.

Judge Hill sworn, testified that he was acquainted with one Thomas W. Grimes many years ago, while a student of medicine; if plaintiff is the same individual, he is a distinguished and able physician, and highly honorable man.

To the admission of which evidence defendant objected. The Court over-ruled the objection, and defendant excepted.

Plaintiff closed, and defendant moved the Court for a nonsuit, on the grounds—that the plaintiff had not shown that he was a licensed physician, nor that he had a diploma from any medical university, nor that he was within any of the exceptions made by the Statutes of Georgia in relation to the practice of medicine, and had failed to introduce his books of account or any original entries.

The Court over-ruled the motion, and defendant excepted.

The defendant then opened his case, and read the evidence of Mrs. Sarah King, who testified that the girl Irena, to whom the medical services was rendered, was, at the time of her sickness, in the possession of her late husband, in the Town of LaGrange, and was used as a house-girl by them; that Dr. Grimes called to see the girl at the request of witness. The girl was the property of defendant, and was left with Mr. King and witness, without any instructions about

calling a physician. Witness did not call Dr. Grimes to the girl as the property of the defendant."

Plaintiff then introduced Robert J. Morgan, to prove that Mrs. King was the mother-in-law of the defendant at the time the account was made. To which evidence defendant objected. The Court over-ruled the objection, and defendant excepted.

Counsel for defendant asked the Court to charge the Jury, that it was necessary for the plaintiff to exhibit in evidence a license to practice medicine, or a diploma from some medical university, or bring himself within some of the exceptions made by the Statutes of Georgia, before he could recover.

Which charge the Court declined to give; the cause being on the appeal, and no plea being filed denying the right of the plaintiff to sue in the character of a practising physician, in which he did sue.

To which refusal to charge by the Court, defendant excepted; and upon these several exceptions errors have been assigned.

BIGHAM, for plaintiff in error.

B. H. HILL, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] One of the grounds of error assigned in this case is, that it is not averred in the declaration, neither was it proven, that the plaintiff was a licensed physician, and as such, authorised to sue for and recover his medical account.

By reference to the forms in *Chitty*, it will be found not to be necessary to make this allegation.

The plaintiff declared in his writ, as a physician; and the defendant, instead of demurring, pleaded to the merits of the action. He is too late to take this exception on the trial term of the appeal.

[2.] It is objected, that the books of Dr. Grimes should

have been produced. And as a matter of practice, the defendant is right. But then, one of the witnesses, Mrs. King, proved the actual rendition of the services. And this is better than the books.

[3.] The Judge's charge is excepted to, because he did not instruct the Jury that they should find that King was insolvent, before Grimes could go against Durand. But this complaint proceeds upon the idea, that King was the hirer of the slave; the proof did not warrant this assumption. But suppose it did, Counsel should have called the attention of the Court to this point. The charge was right, so far as it went. It is no ground for a new trial that it did not go far enough.

We affirm the judgment of the Circuit Court over-ruling the objections to the testimony of Judge Hill and Major Morgan. And although there may have been some irregularity as to the mode of establishing the account, still, as there was no motion made for a new trial, and we are entirely satisfied with the finding, we shall decline to disturb the judgment.

No. 100.—CURTIS LEARY, plaintiff in error, *vs.* MARIA LEARY, defendant in error.

[1.] In an action for divorce, brought by a husband against his wife, a tender and suspicious solicitude on the part of the wife, when in attendance on the sick bed of a gentleman not her husband, may be proven by her conduct as well as by her conversation. If such solicitude be manifested by conversation, however, the witness should give such conversation, or its substance.

[2.] Though a set of interrogatories be improperly rejected, on account of exceptions taken to a question as leading, yet, if another set be sued out, and the evidence desired be submitted to the Jury, and no harm is done by the rejection of the first set, this Court will not reverse the judgment.

[3.] Where amatory letters were written by one to the wife of another, which letters were drawn out by other letters written in the name of his wife, and

sent by the husband to the former, without any knowledge, on the part of the wife, that such letters had been written; and where evidence was offered to show that the person thus duped had proceeded to comply with an assignation proposed in one of these letters, and had repaired to the vicinity of the wife's residence, but without the knowledge of the wife, and without seeing her: *Held*, that these circumstances were not evidence against the wife, in an action for divorce, brought by the husband.

[4.] Declarations made by a person suspected of having criminal intercourse with the wife of another, that he had had such intercourse, but which were not made in the presence of the wife, and in no manner sanctioned by her, cannot be admitted as evidence against her.

[5.] In an action for divorce brought by a husband, it may be proper for him to offer proof to the effect, that he did not know any thing of the report as to his wife's improper intimacy with another man, until some time after it had been put into circulation in the neighborhood.

[6.] So, the fact that the husband had acted promptly in discharging from his employment, and sending from his house, the person accused as an accomplice with his wife, might be of some signification to show that he had not afforded encouragement to such intercourse, but had acted as a prudent husband should under the circumstances.

[7.] It is error in the Judge to sum up and refer to the facts relied upon by one party, to make out his case, and altogether omit any reference to circumstances in proof relied upon by the opposite party.

Divorce, in Houston Superior Court. Tried before Judge WORRELL, May Term, 1855.

This was a libel for divorce, filed by Curtis Leary against his wife, Maria Leary.

The declaration alleged that the defendant, in the latter part of the year 1852, was guilty of adultery with one Samuel G. Logan.

The defendant, in her plea, denied the charge of adultery, and pleaded condonation on the part of the plaintiff.

On the trial, plaintiff tendered in evidence the depositions of Mrs. Mary Lawson, in substance, "that she was acquainted with Samuel G. Logan and Mrs. Leary; and that she had observed, that Mrs. Leary manifested an unusual interest and sympathy for Logan when he was sick, at the house of Mrs.

Leary." To this evidence, defendant objected. The Court sustained the objection, and plaintiff excepted.

Plaintiff then offered in evidence the testimony of Mrs. Mary Marchman, taken by interrogatories.

The following part of the 2nd interrogatory was objected to, because it was leading: "Do you or do you not know of any letters having been received by your father from Logan, who lived at Leary's in 1852, at any time since he left the employment of Leary; if so, did or did you not read that letter or letters? And if you read it or them, please to say where that letter is or those letters are; if destroyed, please state the contents—why destroyed—was or was not the names of Mrs. Leary and Mr. Leary mentioned in the letter—how and in what terms were they mentioned—did or did not the letters ever contain any message to Mrs. Leary? If it did, was it or not delivered; was or was not the letter read to Mrs. Leary; did or did not Mrs. Leary ever request you to write a letter for her to said Logan?"

The Court sustained the objection to the interrogatory and excluded the answer, and plaintiff excepted.

Plaintiff then offered to read in evidence the depositions of Ichabod H. Albertson. To the interrogatories were attached two letters purporting to be written by Samuel G. Logan to Mrs. Leary, one dated "Starkville, June 2d, 1853; the other dated Starkville, Sept. 30th, 1853." These letters were written in reply to letters received by Logan, purporting to have been written by Mrs. Leary. They were full of amatory expressions, and designated places at which he requested Mrs. Leary to meet him, &c.

The evidence of the witness went to show that the letters of Logan were written in reply to letters written and addressed to him (Logan) by Mr. Leary, in the name of his wife. The witness also states that he was at the house of Mr. Leary on the night of October 8th, 1853, the night named in the first letter of Logan to Mrs. Leary, as the time when he requested her to meet him privately; that he was there at the request of Leary to help him to watch; that during the night,

about 12 o'clock, they discovered some person secreted in the garden; that some one shot off a gun from inside of the garden, &c. &c. He believes that Samuel G. Logan was there." The letters received by Mr. Leary from Logan, in reply to those written to him in the name of Mrs. Leary, were taken from the post-office by the witness, at the request of Mr. Leary, and were never seen by Mrs. Leary."

To this evidence defendant objected. The Court sustained the objection, and plaintiff excepted.

The plaintiff then introduced N. J. Sandlin, who testified that "some time in the fall of 1853, a few days after the night of the shooting, Mrs. Leary came to his bed in the house of Curtis Leary, and requested him to get up and hear her talk to Mr. Leary and persuade him to talk to her; that she was not satisfied with the way they were living; that Mr. Leary refused to sleep with her; and she complained of it, as the nights were cold. Witness got up and went with her; she tried to get Mr. Leary to talk the matter over. He said it was no use. She asked him to forgive her, and asked if he could not forgive her, if she would get down on her knees and confess that the charge was true and ask his pardon. He said it was too late, and he could not forgive her. She denied that she was guilty," &c. &c.

Plaintiff then proposed to prove by Stephen Brown, that Mr. Leary did not know of the report of the intimacy between Logan and Mrs. Leary, until some months after it was in circulation. Objection being made, the Court excluded the evidence, and plaintiff excepted.

Plaintiff then proposed to prove by Thomas Judge, that Leary was first told by witness of the report about Logan and Mrs. Leary being too intimate, in a quarrel witness and Leary had in January, 1853. Which, on motion, was excluded by the Court, and plaintiff excepted.

There was much other testimony offered, and some admitted, which it is unnecessary here to set forth.

Among other things, the Court charged the Jury—

"If the proof shows that the defendant is guilty, and that

the plaintiff knowing it afterwards, lived with her in the same house, under the same roof, that they slept in the same room; that the defendant looked after the domestic matters of the family; took care of the children, and attended to their wants; sat at the table with the plaintiff, and waited upon him; used the plaintiff's horses and carriage in visiting her friends and neighbors; I say, if the proof shows these things, or the like, from them, the Jury may infer forgiveness on the part of the plaintiff."

To which charge of the Court, plaintiff excepted; and upon these several exceptions, errors have been assigned.

GIBSON; WARREN, for plaintiff in error.

SCARBOROUGH; MILLER & HALL, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] The first objection is to the decision of the Court below in excluding the depositions of Mrs. Lawson.

This objection was put upon the ground that the testimony was irrelevant. And it has been argued that it was so, because the conversations between Mrs. Leary and Mr. Logan were not given by the witness; and that these are the best evidence of any solicitude which may have been manifested. It is not denied, we believe, that such solicitude or tender interest might be shown in such a case, without proof of any conversations whatever, as would serve to indicate more than a mere friendly or charitable purpose, in the ministrations of a married lady, at the sick bed of a gentleman not her husband. In our opinion, such suspicious solicitude might be evinced, either by what was said by the lady, or by her demeanor, or by both together. If it were, in the opinion of the witness, manifested, either in the first or the latter way, the conversations should be given if possible. If the witness does not recollect the words used, he may give the impression left upon his mind, as to the substance and effect. The opin-

ion formed by Mrs. Lawson, (the witness in this case,) we think, from what she says, rested both on the conversation and the conduct of Mrs. Leary. But she states that she does not recollect the conversation. She gives, therefore, only the result which it and the anxious manner of Mrs. Leary produced upon her mind.

It is every day's practice to receive testimony of *emotions*, as they are manifested by the behavior and bearing of parties. Fear, apprehension, surprise, anger, anxiety, content, satisfaction and dissatisfaction, are thus constantly proven. And the experience of all men sanctions the practice.

We do not wish to be understood as intimating that these depositions really do show that a tender solicitude for Mr. Logan was manifested by Mrs. Leary. Her conduct, perhaps, may be explained by attributing her anxiety and attentions to her charity and hospitable kindness. But this is for the Jury to decide. And we only mean to say that we think these depositions should have been, for this purpose, submitted to them.

[2.] The point next made was, that the Court erred in holding that there was a leading question in a set of interrogatories addressed to Mrs. Marchman; and consequently, excluding them.

We have not examined this interrogatory very closely, but we incline to think that the question, as it comes to us in the record, is not leading. But this is immaterial, as the testimony was obtained by another set of interrogatories, was submitted to the Jury, and no harm was done by the rejection of the first set.

The Act of the last Legislature regulating the granting of new trials, does not affect this view of the subject. We have repeatedly decided that that Act applies only to cases where a motion for a new trial has been made in the Superior Court.

[3.] We think the Court ruled rightly in excluding the testimony of Ichabod H. Albertson.

The circumstances stated by him were in no wise connected with Mrs. Leary. They were *res inter alios acta*. And very

curious things they were which were acted in the comedy to which he testifies. The pen of the humorous dramatist might find some useful hints in his story, from which could be gathered abundant *material* for a comedy of the "Jealous Husband," in the retirement of the country.

By no rule of evidence can the letters spoken of by this witness, and exhibited in connection with his testimony, be connected with Mrs. Leary. It is impossible to say but that the amatory effusions of the duped Mr. Logan, (if it be not injustice to call things *amatory* which remind one so much of the ass's efforts to imitate the lap-dog,) may have been provoked by the seducing epistles in which the husband was representing his own wife as being so sweet upon the dupe, and by the lock of hair which was a part of the contents of one of these letters. It is difficult to say how much these things may have drawn forth from the amarous swain of his rude and salacious demonstrations. It will not do, therefore, to carry these last to the account of previous criminal relations between him and Mrs. Leary, and to infer from them the foregone conclusion which they are offered to demonstrate. Besides, testimony of this sort, obtained in this way by a husband, can never be regarded as competent evidence, even if it did authorize such a conclusion.

If the letters were not proper evidence; and what transpired on the night of the 8th of October, as detailed by Albertson was not evidence, the fact of the witness, Valentine, having met Logan about this time, returning from Houston, for similar reasons, is not proper evidence.

[4.] For a similar reason, too, we think that the declarations which, it was said, were made by Logan, as to his having had criminal intercourse with Mrs. Leary, were not proper evidence. She was not present, did not hear them, and there is no evidence that they were ever brought to her knowledge. And, for anything that the record shows of her connection with these declarations, they may be base slanders.

It would be a most mischievous rule, indeed, which would

admit such statements, unsupported by any recognition of their truth on the part of the person whom they accuse. It would be to place the reputation of every lady at the mercy of any foul-mouthed reprobate, who, casting upon her a lustful eye, might falsely seek to sully her reputation.

[5.] As to the statement of Stephen Brown, we are of opinion that it was not proper evidence, presented as this record shows it was. Yet, we think that it was competent for this witness to prove, if he could do so, by any circumstances within his knowledge, that the plaintiff in error did not know anything of the report, as to a suspicious intimacy between Logan and his wife, until sometime after it had been put into circulation in the neighborhood; thus, to rebut any inference to his prejudice which might be denied from his apparent delay in discharging Logan.

[6.] We think the exception well taken as to the rejection of Thomas Judge's testimony, to the effect that he had informed the plaintiff in error of this report, as to his wife's intimacy with Logan. We are of opinion that this circumstance, taken in connection with the discharge of Logan by him, and sending him from his house, might be looked to, perhaps, as evidence that he had acted promptly, in this behalf, and as a prudent husband should, under the circumstances, after he had received this information, and had not afforded encouragement to such criminal intercourse, if the Jury should find that it had existed.

[7.] Upon the subject of condonation, we think the Court erred in his instruction to the Jury, by summing up and referring to the facts relied upon by the defendant as showing such condonation, and altogether omitting any reference to the circumstances which had been relied on, as proving the contrary. We have more than once disapproved of this mode of charging a Jury.

Let the judgment be reversed.

5. 101.—DAVID ARMISTEAD, plaintiff in error, *vs.* THE STATE OF GERGIA, defendant in error.

[1.] It is a general rule, that even where an accomplice has been joined in the same indictment with the principal, he may still be called as a witness before he is convicted. The practice, however, seems to allow this only where he who is offered as a witness has been acquitted, or where the defendants are severally tried.

[2.] Upon the trial of one of two co-defendants, who are prosecuted for murder, when the trial of one only is progressing and the other is called as a witness: *Held*, that the declarations of the decedent, that the latter "did not touch him" in the fight, is not testimony relative to the issue being tried.

[3.] The rules which justify self-defence have been held to extend only to the domestic relations of parent and child, husband and wife, and master and servant. It would seem, however, that the relation of brother and brother, or brother and sister, or sister and sister, in this respect, may be said to stand upon the same footing of reason and justice, especially if the person assailed is dependent upon the slayer for protection; and such a case, perhaps, would fall within the terms of the 16th section of the 4th division of the Penal Code.

Murder, in DeKalb Superior Court. Tried before Judge BULL, April Term, 1855.

A bill of indictment, for murder, was found by the Grand Jury of DeKalb County, against David and George Armistead, for the killing of James Veal.

At the April Term, 1855, the cause being called, the defendants announced themselves ready, when the Solicitor General claimed the right to put the defendants upon their trial separately, and to say which he would try first. The defendants objected. The Court ruled in favor of the Solicitor General, and he placed David Armistead upon trial, and defendant excepted. The plaintiff having closed his case, the defendant offered George Armistead as a witness, to prove "that the fight was commenced by the deceased and his brother, Wesley Veal; and that the difficulty was entirely unexpected by the defendant and witness; that the act was done in a sudden heat of passion," &c.

The Court rejected the witness, and defendant excepted.

The defendant offered Robert S. Watters as a witness, to prove, by way of rebuttal, "that on the night of the difficulty, and shortly after the occurrence, the deceased, James Veal, stated to witness and others, when they were about taking out a warrant against the two Armisteads, that George Armistead did not touch him during the said difficulty, and refused to take an oath to that effect."

The Court rejected the testimony, and defendant excepted.

Among other things, the Court charged the Jury, "that before they could acquit the defendant upon the ground that he was acting in defence of his brother, they must believe it was absolutely to kill the deceased to save his brother's life, or to prevent the commission of a felony."

To which charges the Court excepted.

The Jury found a verdict of guilty; whereupon, the defendant moved the Court for a new trial, alleging that the Court erred in making the decisions and rulings excepted to by the defendant in the progress of the trial, and upon the further grounds—

1st. "Because it appears that Michael A. Steele, who was one of the Grand Jurors who found the bill of indictment in said case, was not among the Jurors who were empannelled and sworn at the term of the Court at which said indictment was found."

The defendant filed an affidavit, stating that he was not apprised of the fact stated in the foregoing ground for new trial, until after the trial. Cotemporaneous with the motion for a new trial, the Solicitor General moved the Court to correct the minutes of the Court, at the term at which the indictment was found, so as to make the name of the Juror, on the minutes, it being recorded there as A. M. Steele, correspond with that inserted in the bill of indictment, which was Michael A. Steele; which motion the Court allowed, upon proof that the name of the Juror was Michael A. Steele.

In his bill of exceptions, the defendant urges, as a ground

for a new trial, "that Jackson Weaver, one of the Jurors who sat upon the trial of defendant, had, on the day of the trial, and before he was selected as a Juror, stated 'that if he was selected as a Juror in the case, that he would hang the defendant and his brother both;' and that this fact was unknown to him or his Counsel until after the trial of said case, and the Court adjourned immediately after the verdict of the Jury was returned."

This statement was verified by the affidavit of the defendant and affidavits of some two orthree persons, as to the statement of the Juror, Weaver.

The Court over-ruled the motion for a new trial, and defendant excepted.

EZZARD; FLOYD; GARTNELL; CALHOUN, for plaintiff.

SOL. GEN. BLECKLEY; MURPHY; HILL, for defendant.

By the Court.—STARNES, J. delivering the opinion.

It has been long the practice, where several are jointly indicted for an offence which does not require the concurrence of two or more to constitute the crime, to allow a severance by the defendants, and to permit the Counsel for the prosecution to elect which shall be first put upon trial. I believe that the practice is derived from the Common Law. The 50th section of the 14th division of our Penal Code has been considered, in some districts of our State, as amounting to no more than an affirmance of this practice.

A close criticism of the language of this section, however, seems to encourage the conclusion, that something more than this was meant by the words, "any one defendant may be tried separately." This looks very much like a general permission to the Court, where the purposes of justice may require it, to try such defendants separately, whether they elect to be so tried or not. But the direction which we give this case, as will be seen, makes it unnecessary, formally, to decide this point; and as our opinions are not well settled in

regard to the same, we will make no further observation upon it.

[1.] It is a general rule, that "even where the accomplice has been joined in the same indictment with the principal, he may be still called as a witness before he is convicted." (*Hawk's P. C. b.* 2, *c.* 46, *Sec.* 95, 1 *Hale*, 305.) It seems to be the practice, however, to allow the testimony of such accomplice, when thus indicted, only where he who is offered as a witness, has been acquitted, or where the defendants are severally tried. A different rule has been deduced by the Solicitor General, (and perhaps by the Court below,) where two or more are indicted as principals in the first and second degree, from the case of *Studstill vs. The State.* (7 *Ga. R.* 2.) There the prosecuting officer seems to have taken for granted, that a principal in the first degree must be convicted before the principal in the second degree can be; and therefore, that upon trial of the latter, it was necessary to introduce the record of conviction. The Superior Court, trying that case, seems to have adopted that view without investigation; and as no point was made to the contrary, when the case came up for consideration on other points, this Court simply acquiesced in that view of the matter. No investigation was had thereof, and the observation which was made by the Court, does not amount to an opinion given upon an issue made.

The correct rule is that which we now lay down; and the Court below, consequently, erred in deciding that George Armistead was not a proper witness in this case for his brother, who was being separately tried.

[2.] We think that there was no error in rejecting the declaration of the decedent, that George Armistead did not touch him. If George Armistead had been upon his trial, this statement, perhaps, under the circumstances, might be regarded as part of the *res gestæ*. But he was not on trial, and the declaration, therefore, was not testimony relevant to the issue being tried.

[3.] The Court below charged the Jury, that before they

could find the defendant not guilty, upon the ground that he was acting in defence of his brother, they must believe that it was absolutely necessary to kill the decedant in order to save his brother's life, or to prevent the perpetration of a felony upon him.

It is urged that error here lies in not giving the prisoner the benefit of the 16th section of the 4th division of our Penal Code, which, after justifiable homicide has been defined in previous sections, and such circumstances and instances as will amount to the same have been given, declares, that "all other instances which stand upon the same footing of reason and justice, as those enumerated, shall be justifiable homicide."

The rules which justify self-defence, have been held to extend to the relations of parent and child, husband and wife, and master and servant; and to no other domestic relations. It would seem, however, that the relations of brother and brother, or brother and sister, or sister and sister, in this respect, may be said to stand upon the same footing of reason and justice, especially if he or she who was assailed was dependent upon the slayer for protection. If so, such an assault upon a brother or sister as would justify the fears of a reasonable person, that the same would result in death, unless he or she took the life of the assailant, would be his or her justification in so doing.

These are our views on this point. We would not, however, be understood as reversing the judgment on this ground, as no point was made to the Court below, by specially calling his attention to this view of the subject; and it is unnecessary to give direction to the case upon this point, as it goes back upon another ground.

While on this point I desire to say, that this section of the Code which we have been considering, should be cautiously applied by the Courts, in my opinion. This Court has found it frequently misapplied by Counsel, in their fervent zeal successfully to defend their clients. It has become quite common, indeed, ingeniously to interpose it as a

sort of elastic shield which may be broadly spread over almost any homicide. There is great need, therefore, of such caution as may prevent its abuse.

On the ground specified, the judgment is reversed.

No. 102.—WALTER WADSWORTH, plaintiff in error, *vs.* JOSEPH THOMPSON, administrator of the estate of M. W. Furmalt, defendant in error.

[1.] On an affidavit of illegality, the plaintiff's Counsel closed his evidence and his address to the Jury, without reading the *fi.fa.* or the affidavit. The defendant's Counsel then insisted before the Jury, that this omission must prevent them from finding for the plaintiff, who, thereupon, asked leave to then read to the Jury the *fi. fa.* and affidavit: *Held*, that the leave should have been granted to him.

Illegality, in DeKalb Superior Court. Tried before Judge BULL, April Term, 1855.

Richard Peters obtained judgment and execution against John Wadsworth, Walter Wadsworth and Moses W. Furmalt, in the life-time of the latter. Walter Wadsworth paid off the execution and applied to and obtained an order from the Inferior Court of said County, to proceed against Furmalt for one half of the debt, on the ground that they were co-securities for John Wadsworth. To the *fi. fa.* Furmalt filed an affidavit of illegality, alleging that he was security for both the Wadsworths, who were principals in the debt, and that the payment of the *fi. fa.* by Walter Wadsworth discharged him.

The issue on the affidavit of illegality, was submitted to a Jury, when the plaintiff proved by John Wadsworth, that he (witness) was alone interested in the consideration of the note

upon which the judgment was founded, and closed his case. The Counsel for defendant having introduced no evidence, proceeded to state his points to the Jury; and among other things, stated that plaintiff had not tendered in evidence the *fi. fa.* and affidavit of illegality; and that, therefore, the Jury could not find for the plaintiff. Counsel for plaintiff then moved the Court to be permitted to introduce the *fi. fa.* and execution in evidence. The Court refused the motion and dismissed the levy, and Counsel for plaintiff excepted.

EZZARD, for plaintiff in error.

BLECKLEY, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Even if the *fi. fa.* and affidavit of illegality, in cases of this sort, are to be considered as belonging to evidence rather than to pleading, we think that they should, in this case, have been admitted to the Jury by the Court, at the time when the Court was asked to admit them to the Jury. That the Court had the power to admit them to the Jury at that time, there can be no doubt. And the case was one in which, as it appears to us, the power should have been exercised.

The defendant did not put his objection to the admission of the papers, on the ground that he would be surprised by them if admitted. And the nature of them is such, that if they had been admitted, it is probable that they would not have drawn a single comment from his Counsel. They could serve to establish only the formal part of the plaintiff's case.

Now if the power to admit evidence is not to be exercised in such a case as this, what kind of a case is it in which the power is to be exercised? See *Taylor & Taylor vs. Smith*, (16 *Ga. R.* 11.)

No. 103.—JAMES HARRELL, administrator, &c. plaintiff in error, *vs.* JAMES W. and JOHN M. GREEN, defendants in error.

[1.] A testatrix disposes, by will, of what appears to be all of her property, consisting mostly of land and negroes. Among the negroes there are three females, of whom two are child-bearing women, and the other a girl thirteen years old. Of these three she gives one of the women to A and one to B, and the child she gives to C. In a few months she makes a codicil, in which she gives to A and B respectively, the future issue of the two women. The testatrix is an old and infirm person, but she lives three years after the making of the codicil; and a few months before her death, one of the three females, who was a child at the time of the making of the will and codicil, has issue: *Held*, that this issue goes with the mother to C. But see the opinion.

Trover, in Upson Superior Court. Tried before Judge STARKE, May Term, 1855.

This was an action of trover brought by James Harrell, administrator of the undevised estate of Mrs. Barbary Harrell, deceased, against the defendants in error, for the recovery of a negro slave Gabriel.

On the trial, it appeared in evidence that Mrs. Harrall executed her will on the 1st day of January, 1833. By the 1st item of said will she "bequeathed to her daughter, Maria Thomas and her children, a negro woman named Het, about twenty-one years of age, and her child, Anthony, nine months of age."

By the 2d item, she "gave to Andrew J. and John Harrell a negro woman named Hulda, about sixteen years of age, and her child, Virgin."

By another item of said will "she gave to Hardy H. Avon, a negro girl, Matilda, about thirteen years of age, which said girl she wished to remain under the control of James Harrell, as guardian for the property of the said Hardy H. Avon," &c.

On the 6th day of April, 1833, Mrs. Barbary Harrell executed a codicil to her will, as follows:

"It is my will that the future increase of the negro woman, Het, named in the first item of my will, shall belong to and go to Maria Thomas, my daughter, and her children, and that the future increase of the negro woman, Hulda, named in the 2d item of my will, shall belong and go to Andrew J. and John Harrell."

The Court, amongst other things, charged the Jury, "that the slave Gabriel, the subject-matter of the suit, (admitting him, as plaintiff did, to have been the child of Matilda, born after the making of the will and previous to the death of the testatrix, and born a few months before her death,) on the arrival of Hardy H. Avon to the age of twenty-one years, on proof of the assent of the executor to the legacy, passed under the will, with his mother, Matilda, and vested, absolutely, in the said Hardy H. Avon; that the testatrix could not be considered as having died intestate as to Gabriel, on account of his birth after the execution of the will and codicil, and previous to the death of the testatrix; and hence, the *administrator cæterorum* took no right to the slave Gabriel, and was not entitled to recover him as such administrator."

To which charge of the Court Counsel for plaintiff excepted.

O. C. Gibson, for plaintiff in error.

Greene, for defendants in error.

By the Court.—Benning, J. delivering the opinion.

The will in this case was in the following words: "Georgia, Upson County: In the name of God, amen! I, Barbary Harrell, of the County and State aforesaid, do make and ordain this my last will and testament. I recommend my soul to Almighty God. As to my worldly substance, I dispose of the same as follows:

"Item: I give and bequeath to my daughter, Maria Thomas, and her children, Henry Harrell, William Harrell, Nancy Thomas and Lucinda Thomas, a negro woman, named Het, about twenty-one years old, and her child Anthony, nine months of age.

"Item: I give to Andrew J. Harrell and John Harrell a negro woman named Hulda, about sixteen years of age, and her child Virgin.

"Item: I give to my grand-son, James Harrell, a negro boy named Allen, five years of age.

"Item: I give to my grand-son, Augustus George W. Hodges, a negro boy named Ephraim, about three years of age.

"Item: I give to Godfrey Kelly of Jefferson County, a negro fellow named Elijah, about twenty-five years old.

"Item: I give to Abel Hodges a negro fellow named Asa, about twenty years of age.

"Item: I give to Benjamin Alford's orphans, fifteen dollars.

"Item: I give to Cullen Harp and Joseph B. Avon, each, one dollar.

"Item: I give to Maria Thomas and her children, Henry Harrell, William Harrell, Nancy Thomas and Lucinda Thomas, and Andrew J. Harrell and John Harrell, the lot of land I live on, viz: lot No. 258, in the 10th district formerly Monroe, now Upson, containing two hundred two and a half acres, be the same more or less; all my horses, viz: five head; all my cows and calves, and yearlings; two yoke of oxen; all my sheep and hogs; also, all the corn, wheat, oats, and the crop that may be on hand at my death; also, all my household and kitchen furniture of every kind; all of which said property named in this item I wish to be divided into two equal parts, and one half I wish Maria Thomas and her said children named in this item to have, and the other half I wish said Andrew J. Harrell and John Harrell to have.

"Item: I give to Hardy H. Avon a negro girl, Matilda,

about thirteen years of age, which said girl I wish to remain under the control of James Harrell, as guardian for this property of the said Hardy H. Avon. I wish said James Harrell to hire said negro out yearly, into hands that will treat her well, until the said Hardy H. comes of age by law, and apply such portion of said hire to the purchase of necessaries for my daughter, Barbary Avon, as he may think proper in her situation; the balance, if any, to the said Hardy H. when he becomes of age.

"Item: I wish a boy Ellick, about eleven years old, to be sold, and the money arising from his sale to be divided between Maria Thomas and her children, named in the first item, Andrew J. Harrell and John Harrell, Godfrey Kelly and Abel Hodges, to be divided into four parts—one part to go to said Maria and her children, another to Andrew J. Harrell and John Harrell—another to Godfrey Kelly, and the other to Abel Hodges.

"Item: I wish my negro woman, Esther, to be sold; and after taking the expenses of executing this will out of it, and paying the cash herein given, I give the balance of the money to my grand-son, James W. Harrell.

"Item: I make James Harrell and Augustus George W. Hodges executors of this my last will and testament.

"In witness whereof I have hereto set my hand and seal, this first day of January, 1833."

The codicil was in the following words: "Georgia, Upson County: I, Barbary Harrell, of the county and State aforesaid, do make and ordain the following, as a codicil to my last will and testament, to which this is annexed:

"Item: It is my will that the future increase of the negro woman, Het, named in the first item of my said will, shall belong and go to Maria Thomas, my daughter and her children, Henry Harrell, William Harrell, Nancy Thomas and Lucinda Thomas; and that the future increase of the negro woman, Hulda, named in the second item of my said will, shall belong and go to Andrew J. Harrell and John Harrell."

This was dated the 6th of April, 1833.

It was agreed in this Court, by the Counsel on the opposite sides of the case, that John Harrell proved that Barbary Harrell, the testatrix, died in October, 1836; and that she was then quite old, and had been infirm for some time previous to her death.

It seems that a "few months" before the death of the testatrix, the girl Matilda, bequeathed to Hardy H. Avon, had a child.

This child was the subject of the suit; and the question was, whether it passed with the mother to Hardy H. Avon, or remained a part of the estate of the testatrix, in respect to which she died intestate?

The charge of the Court was, that the child passed with the mother to Hardy H. Avon, and the complaint to this Court is this charge.

Was this charge right?

It seems to us to be apparent on the face of the will, that the testatrix intended, not to die intestate as to any property which she had or expected to have.

She bequeaths the land on which she lives; she bequeaths negroes, directing one to be sold, partly to raise a fund for paying the expenses of the administration of her estate; she bequeathes money; she bequeathes two yoke of oxen, all of her horses, all of her cows and calves and yearlings, all of her sheep, all of her hogs, all of her corn, wheat and oats—the crop that might be on hand at her death; she bequeahtes her household and kitchen furniture; she cuts off Cullen Harp and Joseph B. Avon with a dollar each, and the orphans of Benj. Alford with fifteen dollars; and within a few months after the time of making these bequests, which seem to have exhausted all the property which she then had, she, by a codicil, disposes of the "future issue" of the two child-bearing women, which, it is probable, was all the additional property she expected ever to have. Does it admit of a doubt, that the testatrix, by all this, did not intend to dispose of whatever she had in possession, and whatever she had in expectancy?

Assuming, then, that the testatrix intended to dispose of all the property she had and all that she expected ever to have, the question is, did she intend to dispose of the issue of Matilda?

It was insisted for the defendant in error, that she did; and to prove the position, it was argued that she had disposed of the issue of the child-bearing women, by making each woman's issue go with the mother to the donees of the mother; that in this, she must have been influenced by a sentiment of humanity towards these mothers and their offspring, and a sentiment of affection towards the donees of the mothers—those donees being her descendants; that for the other female, Matilda, and for her issue, the testatrix must have felt the same sentiment of humanity; and for the donee of Matilda, a grandson, the same sentiment of affection; that, therefore, it must be inferred that she had as much intended the issue of Matilda to go with Matilda to that grand-son, as she had that the issue of the other two women should go with those women to those her other descendants.

In support of this argument, the Counsel for the defendant referred to several cases which had been decided in South Carolina, viz: (*Haynesworth vs. Cox, Harp Eq.* 116. *Gayle vs. Cunningham, Id.* 124. *Ellis vs. Shell, 4 Eq. R.*) And these cases are certainly in point, to show that in such a case as this, the issue goes with the mother.

[1.] Upon this argument and these authorities mainly, if not entirely, this Court came to the conclusion, that in this case, the issue of Matilda went with its mother to Hardy M. Avon; and therefore, the Court affirmed the decision of the Court below.

I concurred in that conclusion, but I am constrained to say that I now think the conclusion to have been a wrong one. After some reading and some reflection, I am compelled to admit, that I now think that the testatrix did not *intend* to dispose of the issue of Matilda.

The precise truth of the present case, I now take to be this: The testatrix, when she made her will, including the

codicil, intended to dispose not only of all the property which she then owned, but also, of all which she thought she stood a chance afterwards to own. Two of the slaves which she owned were child-bearing women. These two she thought might, before her death, have issue. Issue of these two, therefore, she thought she stood a chance to own; and, therefore, of the issue of these two she disposed. Another of the slaves was a female child only thirteen years of age. The testatrix herself was old and infirm. That, before her death, this child might have a child, whereby she would become the owner of other property than that included in her will, was an idea that never once entered her mind. She no more thought of acquiring other property, in this way, than she did of acquiring other property, by a legacy or the bounty of some friend; and therefore, she did not dispose of the issue of this child, or ever think of doing so any more than she did of disposing of property not to come to her except by such legacy or bounty.

If this be the truth of the case, as I now think it is, we cannot make the issue of this child pass by the will, unless we add words to the will. But we are not at liberty to add words to a will.

Right d. Compton vs. Compton, was a case "where a testator devised to his son, Thomas Compton, (his heir at law,) all his lands for life; and he gave to his grand-son, Thomas Compton, after the death of his father, all the north side of his Down Farm, being about two hundred and fifty acres. He gave to his grand-daughter, Frances, all the south part, being about two hundred and forty acres. He gave to his grand-sons, George and Edmond and his grand-daughter, Elizabeth, the upper part of the Lain farm, being about two hundred acres, equally between them, as long as they should remain single, but if either of them should marry, *then to have paid by the other two £10 a year, for his or her life.* He gave to Edward and John, and his grand-daughters, Mary and Ann, all that lower part of the Lain farm, being about two hundred and forty acres, equally between them, as long as they should live single; but if either of them married, *then*

£10 *a year, for his or their life,* (but not said to be paid by the others.) The testator also gave unto his son's wife £5 a year, out of each of the said farms, if she should survive him. It was contended that the words "to have paid *by the other two,*" used in the clauses respecting the upper part of the Lain farm, (and which had the effect of enlarging the estate of the devisees of that farm to a fee) might be supplied in the devise of the lower farm, in which they were omitted; as there could be no plausible reason assigned for supposing that the testator meant to make a different disposition of one part of the same farm, to certain of his grand-children, from that which he had made of another part of the same farm to others of his grand-children. But the Court decided that the devisees of the lower Lain farm, took an estate for life only. Lord *Ellenborough* said, "that the exposition of a will must be founded on the whole instrument, and made *ex antecedentibus et consequentibus* is one of the most prominent cannons of testamentary construction; yet, where between the parts there is no connection by grammatical construction, or by some reference, express or implied, and where there is nothing in the will declarative of some common purpose, from which it may be inferred that the testator meant a similar disposition, by such different parts, though he may have varied the phrase or expressed himself imperfectly, the Court cannot go into one part of a will to determine the meaning of another, *perfect in itself and without ambiguity,* and not militating with any other provision respecting the same subject-matter, notwithstanding that a more probable disposition for the testator to have made, may be collected from such assisted construction." And His Lordship subsequently said, that "from a testator having given persons in a certain degree of relationship, to him a *fee simple* in [part of] a certain farm, no conclusion which can be relied upon can be drawn, that his intention was to give to other persons, standing in the same rank of proximity, the same interest in another part of the same farm, where the words of the two devises are different. The more natural conclusion is, that as his ex-

pressions are varied, they were altered, because his intention in both cases was not the same. (1 *Jarm. on Wills*, 434.)

Several other cases are cited by *Jarman*, which are to the same effect.

These cases, in my opinion, speak the law; and therefore, they, I think, rather than the S. Carolina cases, ought to be followed.

And this is saying that I think we have decided this case wrong. I certainly so think.

No. 104.—FRANCIS H. MURDOCK *et al.* plaintiffs in error, *vs.* WILLIAM G. LITTLE, defendant in error.

[1.] At March Term, 1853, a recovery in ejectment was had in Crawford County, for lot No. 275, in the 1st district, and $787 for *mesne* profits. At a subsequent term, a motion was made to set aside the judgment and execution issuing thereon, because no process was annexed to the declaration. Pending this motion the land in dispute was cut off in Taylor County: *Held*, that it was not error in the Circuit Court to order the records in the cause to be transferred to that county.

Rule *nisi*, in Crawford Superior Court. Heard and decided by Judge POWERS, March Term, 1855.

In 1849, William G. Little commenced his action of ejectment in Crawford Superior Court, against Francis H. Murdock, Bryan Ingram, H. N. Scarborough, Ewell Webb and Elijah H. Bond, for the recovery of lot of land No. 295, in the 1st district of said county, and for *mesne* profits.

At the March Term, 1853, of said Court, a verdict was rendered in favor of the plaintiff, for the land and seven hundred and eighty-seven dollars for *mesne* profits; upon which judgment was entered and execution issued.

At the —— Term, 18—, of said Court. Counsel for the defendants filed a rule *nisi*, calling upon the plaintiff to show cause why the said judgment and execution should not be set aside on the grounds—

1st. That no process is annexed to the declaration on which the judgment is founded.

2d. There is no process or waiver of process in said case by the defendants or either of them.

Argument being had on the rule, the Court made it absolute and vacated the judgment; which decision of the Court was, by writ of error, carried up to the Supreme Court at August Term, 1854, and by that Court reversed, and the cause remanded for a new hearing.

At the March Term, 1855, of said Court, while the said rule to vacate said judgment was still pending, Counsel for the plaintiff, Wm. G. Little, filed the following rule *nisi*:

"It appearing to the Court that the lot of land for the recovery of which the above stated suit was instituted, is situated in that portion of Crawford County which was, by the Act of the Legislature of Georgia, passed at the session of 1853–'4 of said Legislature, annexed to and included within the boundary of Taylor County:

It is therefore, on motion, ordered by the Court, that the defendants show cause why said cause, together with all the proceedings had therein, and the papers of file connected therewith, should not be transferred to the Superior Court of said county of Taylor, there to be finally disposed of."

On hearing this rule, the Court made the same absolute, and ordered the cause, with all the proceedings had therein, to be transferred to the Superior Court of Taylor County.

To which decision, Counsel for the defendants excepted.

HUNTER, for plaintiff in error.

MILLER & HALL; STUBBS & HILL, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Had the Court decided differently from what it did, we are not sure that we should have reversed the judgment. We see no reason for doing so as it is. The best that has been assigned by the Counsel for the plaintiff in error, is that he cannot attend the Court in Taylor County; and that does not seem to have prevented the Circuit Judge from transferring the cause. And it would be a reflection upon the good breeding of our brother POWERS, to hold that we were more courteous than His Honor.

True, Col. BAILEY says, that let the final adjudication, as to the sufficiency of the process, be what it may, it will terminate the present proceeding. That if determined to be valid the recovery in ejectment, will stand; and if void, a new suit will have to be instituted. But in response to this, we suggest that the same is true of most of the cases which are pending when a new county is created out of an old one; still, the practice has been to transfer them according to the residence of the defendants, and the location of the lands, the titles to which are in dispute.

Besides, if the verdict stands, the writ of *habere facias possessionem* must issue, or if issued, must be enforced and returned in Taylor County. And is not this a good reason why the record should be transferred? At any rate, as the proceeding is yet incomplete, it would seem to be more symmetrical and more in conformity with the spirit of our Constitution, that the further litigation springing out of the ejectment, should be conducted in the county where the land lies.

No. 105.—AUGUSTUS B. MORAN, trustee, &c. plaintiff in error, *vs.* GARDNER DAVIS, defendant in error.

[1.] It is lawful to hunt runaway slaves with dogs, provided it be done with due degree of caution and circumspection.

Case, in Monroe Superior Court. Tried before Judge STARKE, February Term, 1855.

This was an action on the case brought by Augustus B. Moran, as trustee for Mariana Moran, against Gardner Davis, for the recovery of the value of a negro boy Stephen, alleged to have been worth $1200.

On the trial, it appeared in evidence, that as trustee for Mariana Moran, the plaintiff had hired the boy Stephen to the defendant, for the year 1852. During the year, the negro run away, and while out, the defendant employed one Hamblin to chase him with dogs. The negro was found drowned in a creek, into which he had plunged during the pursuit with the dogs."

Among other things, the Court charged the Jury—

That "under ordinary circumstances, the owner, the hirer or overseer of a slave, has the right to pursue the slave if he runs away, with such dogs as may track him to his place of concealment, and to follow him up until the slave may be captured, provided it be done with such dogs as cannot lacerate or wound, or materially injure the slave; and if in doing so, harm should befall the slave, the hirer or overseer will not be responsible for the injury.

In the opinion of the Court, the hirer or overseer has no right to chase the slave with such dogs as may lacerate or materially injure the slave. Should he do so he will be responsible to the owner for all damage that may ensue to the slave."

To which charge of the Court, Counsel for plaintiff excepted.

CULVERHOUSE, for plaintiff in error.

WHITTLE, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] There is but a single question in this case, and that is, is it lawful to track runaway negroes with dogs, and follow them up until they are caught, provided it be done with due degree of caution and circumspection? Judge STARKE instructed the Jury, in substance, that it was. And we concur with him in that opinion.

By the Act of 1770, §24, (*Cobb's Digest*, 976,) it is made lawful for *every* person to take, apprehend and secure fugitive slaves. And by the Act of 1850, (*Cobb*, 1020,) the person so arresting and delivering to the Jailor any runaway slave, is entitled to five dollars.

Upon general principles then, independent of any statutory provision, we should hold that it was allowable, in the performance of this duty, to use the necessary means to effect the object; and that if a capture of the slave could not be accomplished but by the use of dogs, that a pursuit in this mode would be justifiable, provided it were made with such dogs as would not lacerate or otherwise materially injure the slave.

But by examining the XIIth section of the 13th division of the Penal Code, (*Cobb's Dig.* 827,) and comparing it with the Amendatory Act of 1851–'2, (*Pamphlet, p.* 268,) there can be no doubt upon the subject. By the former it is provided, that "any owner or employer of a slave or slaves, who shall cruelly treat such slave or slaves, by unnecessary or excessive whipping, by withholding proper food and sustenance, by requiring greater labor from such slave or slaves than he, she or they are able to perform, or by not affording proper clothing, whereby the health of such slave or slaves may be injured or impaired, or cause or permit the same to

be done, every such owner or employer shall be guilty of a misdemeanor; and on conviction, shall be punished by fine or imprisonment in the common jail of the county, or both, at the discretion of the Court."

This Statute is so altered as to include *overseers*; and to the other acts of cruelty therein specified it adds—"beating, cutting or wounding, and *unnecessarily* biting or tearing with dogs."

Is not the inference irresistible, that dogs may be employed, prudently and properly, in the pursuit of runaways?

The South has lost, already, upwards of 60.000 slaves, worth between 25 and 30 millions of dollars.

Instead, therefore, of relaxing the means allowed by law for the security and enjoyment of this species of property, the facilities afforded for its escape and the temptation and encouragement held out to induce it, constrain us, willingly or otherwise, to redouble our vigilance and to tighten the chords that bind the negro to his condition of servitude—a condition which is to last, if the Apocalypse be inspired, until the end of time; for the author of Revelation beheld, when the sixth seal was opened, and there was a great earthquake, and the sun became black as sackcloth of hair, and the moon became as blood, and the stars of heaven fell unto the earth, even as a fig tree casteth her untimely figs, when she is shaken of a mighty wind, and the heaven departed as a scroll; when it is rolled together and every mountain and island were moved out of their places; and the kings of the earth, and the great men, and the chief captains, and the mighty men, and every *bondman* (doulos, slave or servant) and every *freeman*, hid themselves in the dens and in the rocks of the mountains; and said to the mountains and rocks, fall on us and hide us from the face of him that sitteth on the throne and from the wrath of the lamb; for the great day of his wrath is come; and who shall be able to stand. (*Rev. 6 ch. 12 to 17 verses, inclusive.*)

No. 106.—WILLIAM A. JOICE, plaintiff in error, *vs.* JAMES and PETER SCALES, defendants in error.

[1.] As a general principle, the *lex loci* applies only to the interpretation of contracts, and the remedy on them must be prosecuted according to the laws of the country in which the action is brought. Under this rule, if a party be discharged from imprisonment only, he remains liable for the same debt in another State.

[2.] This rule is not in conflict with the clause of the Federal Constitution, which declares, that "full faith and credit shall be given, in each State, to the public acts, records and judicial proceedings in every other State;" for that applies to such records, &c. as *pleadings and evidence.*

Illegality, in Bibb Superior Court. Heard and decided by Judge POWERS, May Term, 1855.

William A. Joice was arrested under a *capias ad satisfaciendem,* issued from the Superior Court of Bibb County at the instance of J. and P. Scales.

The defendant filed an affidavit of illegality to the *ca. sa.* alleging that the same was proceeding against him illegally, because "the obligation upon which said judgment is founded, was made in the State of North Carolina; and that defendant had been, by the judgment of a Court of competent jurisdiction, in that State, discharged from arrest and imprisonment on account of the debt upon which the present *ca. sa.* had issued," which plea or ground Counsel for plaintiff moved the Court to strike out. The Court sustained the motion, and Counsel for defendant excepted.

CONEY; MILLER & HALL, for plaintiff.

RUTHERFORD, for defendants.

By the Court.—STARNES J. delivering the opinion.

[1.] We may safely assume, as a general principle, that the *lex loci* applies only to the interpretation of contracts to

their construction, and that the remedy on them must be prosecuted according to the laws of the country in which the action is brought. This rule is approved by our reason; and it seems to be now regarded, generally, as the correct rule in the Courts of England and of the United States. It has the sanction of learned Jurists in other countries, as is shown by Judge *Story*, in his *Conflict of Laws*, §§573, 574. (See, also, 2 *Kent Com.* 462. *Whittemore vs. Adams*, 2. *Cow.* 620.)

Under the effect of this rule, if a party be discharged from imprisonment only, he remains liable to arrest for the same debt in another State; for the imprisonment is only one method of enforcing the remedy, and in no wise has relation to the contract.

Some conflict with this doctrine may perhaps be found in a few cases; but it probably has its origin in the case of *Molan vs. Fitz James*, (1 *Bos. & P.* 138;) and arises out of a misapprehension of that case. That was a case where a bond was given in France, not binding on the person of the obligor, according to the contract. It was sued in England; and Lord Ch. J. *Eyere* held, that "if it appears that this contract creates no personal obligation, and that it could not be sued as such by the laws of France, there seems to be a fair ground on which the Court may interpose to prevent a proceeding so oppressive as a personal arrest in a foreign country," &c. Again, he says, "I cannot conceive that what is no personal obligation in the country in which it arises, can ever be raised into a personal obligation by the laws of another. If it be a personal obligation there, it must be enforced here, in the mode pointed out by the laws of this country. But what the nature of the obligation is, must be determined by the law of the country where it was entered into; and then this country will apply its own law to enforce it."

Here, it will be observed, the contract itself, *ex directo*, excluded personal liability. There is a difference between this and a contract which binds the party personally, but which the laws of the country enforce only *in rem*, and not *in personam*.

It is from a failure to apprehend this distinction, it seems, that some Courts have supposed they were following the above case, in holding that the law of the contract must control such a case as that before us; and that a party discharged from imprisonment by the laws of the State where the contract was made, cannot be arrested on the same debt in another State.

As we have suggested, the rule we lay down is founded upon plain principles of reason and propriety. A different principle would give to the laws of a State extra territorial operation, causing those of one State to control in another, in the enforcement of remedies.

[2.] This rule is not in conflict with the clause of the Constitution of the U. S. which declares that "full faith and credit shall be given, in each State, to the public acts, records and judicial proceedings of every other State." This clause is not to be received in the fullest import of the terms. It is referrible to such records, &c. as *pleadings* and *evidence*. Any other construction, which would give the same effect to a foreign judgment as to our own, would, indeed, be to give the laws of one State complete operation in another—would be to make a judgment in one State bind property in another. (See *James vs. Allen*, 1 *Dall.* 188. *Mills vs. Duryee*, 7 *Cranch*, 481. *Whittemore vs. Adams*, 2 *Cow.* 633.)

Let the judgment be affirmed.

No. 107.—P. B. Cox, plaintiff in error, *vs.* The Mayor & City Council of Griffin, defendants in error.

[1.] Creditors of the Monroe Rail Road & Banking Company levied on certain lots in the City of Griffin. The Mayor & Council of the City of Griffin filed a bill against these creditors, to prevent the levies from being executed, alleging that the lots had been dedicated to certain uses for the benefit of the citizens of Griffin: *Held*, that such a bill lay at the instance of the Mayor & Council of the City of Griffin. But see the opinion.

[2.] Whether an injunction shall be dissolved or not, on the coming in of the answer, is a question for the discretion of the Court.

In Equity, in Spalding Superior Court. Decision by Judge Starke, May Term, 1855.

Some time prior to the Month of June, 1840, the Monroe Rail Road & Banking Company laid off, in the then County of Pike, now the County of Spalding, on the line of the Monroe Rail Road, the place of a city named and entitled the City of Griffin, consisting of divers streets and alleys, building squares and lots, and of squares and lots especially set apart, designated, reserved and dedicated as public squares, sites for churches, academies, burial grounds, and a square as the site of a general parade field and a court-house site.

In June, 1840, the company exposed the city lots to sale, with the reservations of the streets and lots aforesaid, with the public understanding, on the day of sale, that said lots and squares were to be dedicated to religious, educational and public uses. A great number of lots were sold for large prices. Pinkney B. Cox and Gabriel H. Cox obtained judgments against the Monroe Rail Road & Banking Company, long after the sale of the said city lots by said company, and caused the *fi. fas.* issued thereon to be levied upon lots set apart and dedicated as sites for Episcopal and Protestant Methodist Churches; one set apart for a female academy, and one reserved and dedicated for a public square. Also a lot set apart and dedicated as a site for a Presbyterian Church.

The bill set forth the foregoing facts, and prayed that Pinkney B. and Gabriel H. Cox, be perpetually enjoined from proceeding with their *fi. fas.* against said property.

To this bill Pinkney B. Cox filed his answer, in which he admits that the Mayor & Council of Griffin is a body corporate, created by the Act of the Legislature, passed in 1850, and denies that they had any existence as such, prior to that time. The defendant admits the laying off the City of Griffin, as charged in the bill, but denies that the lots levied on were dedicated to public uses; and charges that they are now vacant and unoccupied.

The defendant, in his answer, denies that the Mayor & City Council have any jurisdiction or authority over the lots and squares in said city, which have been levied on.

The defendant denies that the Monroe Rail Road Company ever made any donation of the lots, either public or private; and charges that the legal title to the same is still in the company. The defendant charges that the said company is insolvent and owns no other property, subject to his claims, than that which has been levied on, and insists that the complainant is a volunteer and an interloper—having no right or authority to interfere.

Upon the coming in of the answer, defendant moved the Court to dissolve the injunction, upon the grounds—

1st. Because the equity of the bill is sworn off.

2nd. Because the complainant does not show that he has any interest in the property, or any title thereto, or privity with the parties; and does not show the legal title out of the company, or that he has any right of trusteeship over said property, by charter or otherwise."

The complainant moved the Court to read the affidavits of A. A. Gaulding and William M. Leak, in support of his bill, in substance, as follows: "that deponents were present at the sale of lots in the City of Griffin, in June, 1840, by Lewis L. Griffin, the President of the Monroe Rail Road & Banking Company; that the said Griffin, then and there, in a

public speech, stated as an inducement for purchasers to pay higher prices for lots, that the public squares, church and academy lots, were reserved and dedicated by the company for the use of the public, for the purposes specified in the plan of said city, and that those purchasing lots would purchase an interest in said lots so dedicated," &c. &c.

To the reading of these affidavits defendant objected, upon the ground that the affiants were citizens of Griffin; and as such, liable to pay taxes for Lawyers' fees, costs, &c. in this case. The Court over-ruled the objection and allowed the affidavits to be read, and defendant excepted.

After argument being had on the motion to dissolve the injunction, the Court over-ruled the motion and refused to dismiss the bill, and defendant excepted.

COX, for plaintiff in error.

ALFORD & MOORE, for defendants.

By the Court.—BENNING, J. delivering the opinion.

Ought the injunction to have been dissolved? This is the only question.

The motion to dissolve the injunction was put upon the two following grounds:

"First. That the equity in said bill is sworn off.

"Secondly. That the complainant does not show that he has any interest in the property, or any title thereto, or privity with the parties; nor does he show legal title out of the Monroe Rail Road & Banking Company; nor does he show his right of trusteeship over said property, by charter or otherwise."

The latter of these two grounds may be resolved into the general proposition, that even if the bill be true, the complainant had no right or title to sue in respect to the matters stated in the bill. This ground will be first considered.

The complainant, the Mayor and Council of the City of

Griffin, states its claim to the right to bring the bill in the following words: "And your orator further states that the corporate authority of the said City of Griffin extends, by law, over all that area of land lying within one mile of the centre of said city, according to its original plan; and that the several streets and alleys, public squares, church squares or lots, academic squares or lots, court house square, burying-ground and general parade-field, hereinbefore mentioned, are within the corporate limits and jurisdiction of said city. And your orator avers, that among the powers and duties appertaining to your orator, under the charter of the City of Griffin, and resulting from your orator's character and functions as a municipal corporation, is that of exercising municipal care, protection and trusteeship of and over the streets and alleys aforesaid of said city, and of and over the aforesaid public squares, church squares or lots," &c. "It is clearly part of your orator's duty and jurisdiction to take care and see to it, that said parcels of land, nor any portion thereof, be stripped in any manner, or by any means, of the public character impressed on them in the original plan of the city, or be, by any mode, converted into mere private property," &c.

The complainant does not claim that in these lots, squares, alleys and streets, it has any *property* whatever. It merely claims, that "among the *powers* and *duties* appertaining" to it "is that of exercising municipal care, protection and trusteeship of and over the streets and alleys," &c. of the city; and that, by virtue of this, it has the right to prosecute this suit; a suit, the object of which is to prevent the sale of the streets, alleys and lots aforesaid, as private property, under execution against the Monroe Rail Road & Banking Company.

What, then, are the "powers and duties appertaining" to the Mayor and Council of the City of Griffin?

When this case was argued before us, we found it difficult to investigate this question. The suit was commenced in 1853. At that time, a Statute of 1850 was in force, which, among other things, declared that "the said Mayor and Council of the City of Griffin, shall be" "entitled to all the cor-

porate privileges of the corporate authorities of the City of Augusta." And the charter of the City of Augusta we could not procure. No book that we could find at Decatur contained a copy of that charter.

And this point in the case turned upon what that charter contained; for although the Act aforesaid of 1850, was repealed in 1854, by an Act "to amend an Act to incorporate the City of Griffin," &c. yet this latter Act was not, as it seemed, relied on at all for any purpose, by either party. The defendant admits the complainant to be a still subsisting corporation under the Act of 1850. His language is, "this respondent admits that the Mayor and Council is a body corporate, created by Act of the Legislature of the State of Georgia, approved February 21st, 1850; and that the charter, according to said Act of Incorporation, is declared to be the same as the present charter of the City of Augusta."

All of which being so, it followed that we had to decide this point in the absence of the law which governed it.

It was the recollection of one member of the Court, that the grant of power to the corporation of Augusta, was quite a broad grant—sufficiently broad to authorize, in his opinion, such a bill as the present one.

That bill had had the sanction of His Honor, Judge STARKE, of the Superior Court.

[1.] Under such circumstances, what could this Court do but affirm the action of the Court below, and say that the present bill is one which the complainant, in its corporate character, could bring? This, therefore, is what it did.

But as one member of the Court, I took occasion to say to the other two members, that if, when I should come to write out the opinion of the Court, I should find the charter of the City of Augusta to be such as not, in my opinion, to sustain the Court's judgment on this point, I should, for myself, feel bound to say so.

And this I shall now do; for having examined that charter, I do not think that the judgment of the Court, on this point, is sustained by it.

The following are the words in which this charter confers power or franchises of a general nature, on the "City Council of Augusta:" "And they and their successors hereafter to be appointed, shall have a common seal, and shall be capable, in law, to purchase, have, hold, receive, enjoy, possess and retain to them and their successors in office, for the use of the City of Augusta in perpetuity, or for any term of years, any estate or estates, real or personal, messuage, lands, tenements or hereditaments, of what kind or nature soever, within the limits of the said city, and to sell, alien, exchange or lease the same or any part thereof as they shall think proper, and by the same name to sue and be sued, plead and be impleaded, answer and be answered unto in any Court of Law or Equity in this State; and they shall also be vested with full power and authority, from time to time, under their common seal, to make and establish such by-laws, rules and ordinances respecting the harbor, streets, public buildings, workhouses, markets, wharfs, public houses, carriages, wagons, carts, drays, pumps, buckets, fire engines, the care of the poor, the regulation of disorderly people, negroes; and, in general, every other by-law or regulation that shall appear to them requisite and necessary for the security, welfare and convenience of the said city, or for preserving peace, order and good government within the same; and the said city council shall also be vested with full power and authority to make such assessments on the inhabitants of the City of Augusta, or those who hold taxable property within the same, for the safety, benefit, convenience and advantage of the said city, as shall appear to them expedient; and to affix and levy fines for all offences committed against the by-laws of the said city; and they are hereby authorized to appoint a clerk, treasurer, harbor master, fire master, marshal, constables and all such other officers (affixing the salaries and fees of such officers respectively) as shall appear to them requisite and necessary for carrying into effectual execution all the by-laws, rules and regulations they may make for the good order and government of the said city, and the persons residing therein:

Provided, that nothing herein contained shall authorize to remove or alter the place for the public market house within the said city, but the one now established may be enlarged or extended as the convenience of the citizens may from time to time require; nor shall they make any by-laws repugnant to the Constitution or laws of the land: *And provided, also*, that the by-laws, rules and ordinances they make shall at all times be subject to the revisal, alteration or repeal of the Legislature." (*Mar. & Craw.* 138.)

Now among the powers conferred by these words, I see none which, in my opinion, authorizes the corporation to bring such a bill as this is. The power to make by-laws of any kind cannot, I think, authorize such a bill. The bringing of such a bill cannot be in the exercise of the power to make a by-law; nor, indeed, is it pretended that this bill was brought for the violation of any by-law.

Such acts as those complained of in this bill could not, as far as I can see, interfere with the exercise of any one of the powers enumerated in the aforesaid words of the charter.

And if this be so, on what ground is it that the corporation can justify the bringing of a bill, with respect to such acts? It could exercise all of its powers to the full, notwithstanding that such acts should be done. What need, then, would it have of any aid from Equity? If the acts were such as would, if done, stop it from exercising any of its powers, then it would have a reason for asking Equity to prevent such acts from being done.

And, if such acts as those complained of in this bill would not interfere with the exercise of any of the "*powers*" of the corporation, they could not interfere with the performance of any of the "*duties*" of the corporation; for it cannot be the duty of a corporation to do more than exercise all of its powers.

The *charter*, then, did not, as it seems to me, give the Mayor and Council of the City of Griffin the right to bring this bill.

And when I look into general law, (if I am at liberty, in

such a case, to look there at all,) I also find nothing which, as I think, authorizes such a bill.

All remedies are for injuries to rights; and all rights relate either to the person or to property.

But the acts complained of in this bill do not injure any right relating either to the person or to the property of the complainant.

Could this complainant compromise the matter in controversy in this case, or release the defendant from liability on account of the acts complained of, so that the compromise or the release would be a bar to any action which the citizens of Griffin, or any of them, might have against the defendant for such acts? According to the bill, it is those citizens who own all the rights which resulted from the alleged dedication made by the Monroe Rail Road & Banking Company. As to those rights, the corporation owns nothing whatever. They would continue to exist if the corporation were extinguished forever.

I can find no precedent, and I know of no principle, which warrants a bill of this kind. I am obliged to say, therefore, that I think that the judgment of the Court (which I concurred in giving) was wrong. I now think that the complainants had no right to bring such a bill as the present one is; and, therefore, of course, I think the Court below was in error not to dissolve the injunction. That was all it was asked to do.

The other question is, was the equity of the bill sworn off?

We rather think it was. But still, we cannot say that it follows that the injunction should, as a matter of course, have been dissolved. This Court has more than once held that the dissolving or not dissolving of an injunction, is a matter within the discretion of the Court. (15 *Ga. R.* 556. 12 *do.* 8. 9 *do.* 552; and see 13 *do.* 145.)

In this case, the main matter in dispute happened nearly fifteen years before the answer was filed. It was of a nature, too, about which the memory might well be at fault. The question, as raised by the bill and answer, was, whether

the sale of the city lots was according to one plan of a city or according to another, but not very and dissimilar plan.

In such a state of things, the Court might properly, as we think, in the exercise of its discretion, listen to the affidavits filed by the complainants in support of the statements in the bill; and so, refuse to dissolve the injunction.

And how much the credibility of the affiants was affected by the fact that they were citizens of Griffin, was a question for the Court.

[2.] In short, in the refusal of the Court to dissolve the injunction, we do not see any "flagrant abuse" of discretion.

We therefore affirm the judgment of the Court below.

No. 108.—WILLIAM B. CHAPMAN, plaintiff in error, *vs.* THE STATE, defendant in error.

[1.] Hudson and Hutson are *idem sonans*.

[2.] Although the State should fail to prove any particular day, month or year on which the defendant played and bet at cards, still, the testimony is sufficient to warrant a conviction, if it is shown to have been done at any time within two years immediately preceding the term of the Court at which the bill was found.

Indictment for misdemeanor, in Fulton Superior Court. Tried before Judge BULL, April Term, 1855.

This was an indictment, found by the Grand Jury of Fulton County, at the April Term, 1854, of the Superior Court, against the defendant, William B. Chapman, for playing and betting at various games played with cards. To which the plea of not guilty was filed.

On the trial, Counsel for the defendant, before arraignment, moved the Court to quash the bill of indictment, upon the

ground that it appeared, from the bill, that Wesly Hudson and Edmund R. Gresham, acted as Grand Jurors in finding the said bill, when it appeared from the minutes of the Court, at April Term, 1854, that Wesly Hutson and Edmund R. Gresham, were sworn and acted as Grand Jurors at said term of the Court, when said bill was found. Which motion the Court over-ruled, having previously, on motion of the Solicitor General, allowed the minutes of the Court to be corrected, upon parol proof that the name of the Juror was Edmund R. Gresham, so as to make the name of the Juror Gresham, upon the minutes, correspond with that inserted in the bill of indictment; and Counsel for defendant excepted.

James Sartin, sworn for the State, testified: "that he saw defendant play and bet for money at a game of cards, poker or seven up, some time during the years 1851, 1852, 1853, or 1854—could not specify the year—thought it was within two years immediately preceding the term of the Court at which the bill of indictment was found; could not state the day, month or year."

Counsel for defendant requested the Court to charge the Jury, that before they could find the defendant guilty, it was incumbent upon the State to prove and show a particular day upon which the offence was committed.

Which charge the Court refused to give, but did charge the Jury, "that if they were satisfied from the evidence, that the defendant had played and bet for money at any game of cards charged in the bill of indictment, at any time within two years immediately preceding the term of the Court at which said bill was found, although the State had shown no particular or specific day, month or year, they ought to find the defendant guilty.

To which charge and refusal to charge by the Court, Counsel for defendant excepted; and upon these exceptions, errors have been assigned.

GARTRELL & GLENN, for plaintiff in error.

SOL. GENL. BLECKLEY, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] No error is assigned as to Gresham's name; and the question is, whether Hudson and Hutson be *idem sonans?*

In 7 *Missouri Reports*, 142, the point was made upon this identical name; and it was held, that the popular pronunciation of the two letters which constitute the alleged difference in the word, whether written Hudson or Hutson, being precisely the same, there was no difference.

We would merely add, that mistakes in spelling or writing the names of Grand Jurors, either by the clerk of the Jury, in the body of the indictment, or by the Clerk of the Court, upon its minutes, may always be corrected—the real question being as to the identity of the person. The change continually going on in the mode of spelling names—the different pronunciation of the same name, according to the circumstances and condition in life of the owner, makes the objection, upon the score of discrepancy, much less material than formerly. *Idem sonans* is no longer an infallible test. *Identitate personæ*, and not *identitate nominis*, is and should always have been the true and only issue.

[2.] We see no error in the charge of the Court. It was in conformity with the law and the decisions of this Court, and is the best rule that could be prescribed for defendants; because the more vague and indefinite the accusation and the proof, as to time, place and circumstance, the more secure and complete will be the bar against any other prosecution for a similar offence, within the statutory period of limitation. And the *onus* will be upon the State, under such generality, to show that it was a different offence—the record being *prima facie* evidence that it was the same.

No. 109.—WILLIAM S. HEARD, plaintiff in error, *vs.* ALLEN B. HEARD, defendant in error.

[1.] A *certiorari* does not lie to correct the decision of a Court convened to hear and determine cases under the Act of 1821, passed for the purpose of quieting and protecting the possession of personal property, &c.

Certiorari, in Heard Superior Court. Heard and decided by Judge BULL, June Term, 1855.

Allen B. Heard sued out before Wm. T. Davis and John J. Hendricks, Justices of the Peace, a possessory warrant against Wm. S. Heard, for the recovery of the possession of a negro woman slave, Esther, alleging in his affidavit, "that on or about the 1st of July, 1853, Wm. S. Heard, by fraud, seduction, or other undue or unlawful means, took and carried away the said slave from the possession of defendant," &c.

The officer arrested the defendant and brought him before the Justices, on the 20th of December, 1854; his Counsel not being present, the Court postponed the trial until the 23d, when the defendant again asked for a continuance, on the ground of an absent witness—remarking, that if the Court would give him one hour he would go to trial whether his witness was present or not. The Court consented. On the trial, the plaintiff proved his possession of the slave in the year 1853, and the admissions of defendant, that he had the slave in possession when arrested by the officer under the warrant.

The Justices committed the defendant to jail, without bail or mainprize, until the said negro woman should be produced; whereupon, the defendant sued out a writ of *certiorari* to the Superior Court of said county, asking the Court to review and reverse the decision of the Magistrates—

1st. Because the plaintiff embraced several distinct and substantive grounds in his affidavit, as the means by which he lost possession of the said negro woman.

2d. Because the Court forced him to trial without his witness.

3d. Because the plaintiff did not swear positively, but that he was advised and believed, that the negro woman was in the possession of the defendant. At the hearing of the *certiorari*, Counsel for the defendant moved to dismiss the *certiorari*, upon the ground that it will not lie for error committed in the judgment of the Court below, in the trial had upon the return of the possessory warrant. The Court sustained the motion and dismissed the *certiorari*, and Counsel for Wm. S. Heard excepted.

MABRY, for plaintiff in error.

FEATHERSTONE, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

In the case of *Marchman vs. Todd*, (15 *Geo.* 37,) this Court suggested that it was questionable whether or not the Legislature had made suitable provision for carrying into effect the grant of power by the Constitution to the Superior Courts for the purpose of correcting errors by *certiorari*, in some cases where the proceeding by an Inferior Judicatory is of a summary nature—and especially in cases arising under the Act of 1821, for quieting the possession of personal property. Further consideration has satisfied our minds that our legislation on this subject has no application to such cases.

The 54th section of our Judiciary Act of 1799, in direct terms, refers to the writ of *certiorari* issuing to the *Inferior Court*—the county Court so called.

The Act of December 16th, 1811, regulates the granting of the writ of *certiorari* in "a Magistrate's Court," where the case has been "tried by a Jury in said Court." An Act of December 29th, 1838, limiting the time in which a *certiorari* shall be brought, to the period of six months next after the

case has been determined, refers to this Act of 1811, is amendatory of it, and applies only to cases of *certiorari* granted after a Jury trial in a Justice's Court.

An Act of 1831, authorizes "the prevailing party" to have execution for the costs "in all cases carried up from a Justice's Court," if "the writ of *certiorari* shall be sustained, and a new trial ordered." Thus looking to the definite organization of *a Justice's Court*. But who shall grant an execution for costs in such a case as that before us, if it be sent back, especially if both Magistrates shall have gone out of office?

An act of December 27th, 1842, refers to cases of *certiorari* granted after a trial *on the appeal* in a Justice's Court.

And the Act of February 21, 1850, allowing the Clerk of the Superior Court to grant the writ of *certiorari*, and rendering the Judge's sanction unnecessary, applies also to cases of *certiorari* from a judgment in a "Justice's Court."

All of these Acts, and the general Constitutional provision by which the Superior Court is empowered to correct errors in Inferior Judicatories, by writ of *certiorari*, (and, together, they constitute our legislation on this subject, we believe,) in our opinion, have application to Courts which have something like permanence in their organization, as the Inferior and Justice's Courts proper, or the Municipal Courts in some of the cities. When error is committed by such Courts, and is taken up for correction, the judgment remitting the cause can be sent back to a judicatory having a definite existence, a fixed organization.

But to whom can such a judgment, in a case like this, be sent, when the error is committed by a Court called together for a temporary purpose, and existing only for the time of the trial? Suppose the two Justices who tried the case have gone out of office, to whom shall the case be sent?

It was not the Justice's Court for either of the districts in which the Magistrates presided, nor of both, which tried the case, but it was the Justices themselves, made a Court *pro*

hac, by special provision of law—which Court expired with the termination of the trial.

The view we take of this question is strengthened by the action of our Legislature in the case of a *certiorari* to be directed to Justices of the Peace or of the Inferior Court, trying slaves or free persons of color for crimes and misdemeanors, under the Act of December 19th, 1816.

An Act of December 29th, 1829, provides, that in such cases, a *certiorari* may be addressed to such Justices, directing them to certify and send up their proceedings, and gives to the Superior Court the right to make "such order, judgment and decision as shall be agreeable to law and justice." In the second section of the Act, this judgment is termed "the final order and decision," &c.

It will be seen that this Act thus obviates all difficulty or embarrassment in sending the case back to a bench of Magistrates *temporarily convened* by special provision, and especially by making the judgment of the Superior Court final and conclusive.

No such provision has been made for cases like that before us, and we must affirm the judgment of the Court below.

No. 110.—SARAH H. COALSON, plaintiff in error, *vs.* JOSEPH TOOKE, executor, defendant in error.

[1.] S H C, the widow of A J C and B B, applied for letters of administration upon the estate of A J C, deceased. The application was resisted, on the ground that A J C died testate. This will being proven in solemn form, the same was admitted to record. S H C moved to set aside the probate that she was an infant during said proceeding, and did not attain to the age of 21 until 12 months after its termination: *Held*, that the probate, under the special facts of the case, would not be opened for her benefit.

Motion to set aside probate of will, in Houston Superior Court.

For the facts of this case see the decision of the Court.

KILLAN, for plaintiff in error.

BAILEY, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Sarah H. Coalson and Bryant Batton applied for letters of administration upon the estate of Andrew J. Coalson, deceased, the husband of the said Sarah H. to the Court of Ordinary of Houston County. The application was caveated and resisted by Joseph Tooke and Jacob Watson, who moved to prove and set up an alleged copy of a will of said deceased, in which the said Tooke was named as executor.

The Court of Ordinary, at its September Adjourned Term, 1852, awarded judgment against the granting of administration, and set up and admitted to probate and record the copy will, the same having been proven in solemn form. An appeal was entered to the Superior Court by Mrs. Coalson and Batton; and the Special Jury having found that Coalson died testate, and that the paper propounded was a true copy of his last will and testament, the original having been destroyed, the judgment of the Ordinary was affirmed.

Whereupon, a writ of error was prosecuted by Mrs. Coalson and Mr. Batton to this Court; and after argument had at the February Term, 1853, the judgment of the Circuit Court was affirmed.

Mrs. Coalson now presents herself, and representing that she had not attained to the age of 21 until after the termination of these proceedings, the whole thereof may be annulled as irregular, illegal and voidable, if not absolutely void.

Is she entitled to this indulgence?

Whether founded upon solid grounds or not, the distinction seems to be well established in the books, that while infant plaintiffs will be bound by decrees and judgments, infant defendants will not, unless the same are manifestly for their benefit, or unless a day is given them in Court, after coming of age, to look into the proceeding. (*Bingham on Infancy*, 118. 5 *Bac. Abr.* 123, 147. 2 *Coke's Just.* 383. 18 *Eng. Ch. Rep.* 224, 225. 1 *Daniel's Ch. Rep.* 92. 2 *Sch. & Lef.* 159. 2 *P. Wms.* 519. 2 *Ball & B.* 454.)

The position of Mrs. Coalson to this litigation, is somewhat doubtful. She is the movant, it is true; but then she is met with a caveat, which not only defeats her application, but sets up a new, substantive and independent issue. Had the defence stopped with resistance to her application, upon the plea, for example, that she was a minor, and therefore incapable of administering, the question would have been a plain one. She would have sustained the relationship of plaintiff to the proceeding, unquestionably. But suppose an infant were to sue, at Law, upon a monied demand, and the defendant plead a set-off and get judgment for a balance, could such a judgment be set aside upon the ground that the original plaintiff in the case, though defendant in the judgment, was an infant?

I confess myself somewhat puzzled to solve the difficulty.

But is there not another principle involved in this case; and that is, what is the effect of proving a will in solemn form? Some of the authorities hold, that like a decree in admiralty, it binds every body, whether made parties to the proceeding or not, and whether infants or adults. That infant legatees are bound is clear, unless the executor colludes with the next of kin or is guilty of gross *laches*. Mrs. Coalson is a legatee of her husband's will; but this doctrine cannot apply to her, because, instead of being represented by the executor, his interest is antagonistic to hers. She takes more by the Statute of Distributions than she does by the will. (1 *Greenleaf's Ev.* §§541, 543, 550. 2 *Smith's L. C. in notes, top, pages* 433, 434, 435, 440, 442.)

This case is environed with troubles.

Mrs. Coalson must be considered as being present "at the probation and approbation" of this testament, to use the quaint language of Peter Loveless and other old writers on wills. She, in connection with Bryant Batton, who was, in fact if not in form, her next friend, contested the validity of the will through three Courts. According to her own statement, she lacked only one year of attaining her majority when the last judgment was rendered. She had been a wife and was now a widow. Shall this probate be now set aside at her instance, admitting that there was some oversight or irregularity in not placing it upon the record that she appeared, by her guardian *ad litem*, Bryant Batton? Would not this be sacrificing the substance for the shadow? Would it not shock the moral sense?

Without intending to intimate, then, what would be the opinion of this Court as to the effect of the probate of a will in solemn form, should a *feme covert*, or *infants*, be omitted in the notice; or if cited, having no *prochein ami*, or guardian *ad litem*, appointed to represent their interest, we hold, under the special facts and circumstances of this case, that this party is not entitled to have the probate of the will re-opened for her benefit.

No. 111.—JOHN NEAL, assignor, plaintiff in error, *vs.* HENRY G. LAMAR, JOHN LAMAR and THOS. R. LAMAR, defendants in error.

[1.] The single fact that a witness appears as a party upon the record, is not sufficient to exclude his testimony, if he have no interest in the event.

[2.] An administratrix may execute an instrument releasing a witness from all liability to her intestate's estate, where it is for the interest of the estate that this should be done.

[3.] One of several parties defendant to a judgment cannot be admitted as a witness to prove circumstances going to show that the judgment was dormant, as this would be to allow him to furnish evidence in favor of his own interest.

[4.] The Act of December 19, 1822, commonly called the Dormant Judgment Act, does not necessarily require the settlement of executions within the period of every seven years, nor prohibit a judgment creditor from indulging his debtor, *in good faith*, beyond that time. It was intended to prevent the *fraudulent* enforcement of *dormant* judgments to the injury of *bona fide* creditors.

Fi. Fa. and illegality, in Bibb Superior Court. Decided by Judge POWERS, May Term, 1855.

The executors of James Billingslea obtained a judgment and execution against the defendants in error, at the March Term, 1845, of Bibb Inferior Court. On the 15th day of January, 1849, the plaintiff transferred the *fi. fa.* to John Neal. On the 12th day of June, 1850, the Sheriff of Pike County, where Neal resided, the defendants, at that time, living in Bibb and Clarke Counties, made a return on said *fi. fa.* of "no property."

On the 12th day of August, 1854, the *fi. fa.* was levied, by the Sheriff of Bibb County, on property of John Lamar, who died since the judgment was obtained, one of the defendants and a joint principal in the *fi. fa.* To which proceeding the administratrix of John Lamar filed an affidavit of illegality, on the following grounds:

1st. Because the *fi. fa.* is dormant, the return of the Sheriff of Pike County being fraudulent, defendants having, at the

time, property in Bibb, Clarke, Monroe and other Counties, subject to the *fi. fa.*

2d. Because John Lamar's estate is discharged from all liability on account of said *fi. fa.* he being only security on the note on which the *fi. fa.* is founded, and Neal having, for a consideration, given H. G. Lamar time and further day of payment on the *fi. fa.* without the consent of John Lamar, or his representative since his death.

3d. Because if any thing is due on said *fi. fa.* it is only the principal, Neal having agreed with Henry G. Lamar to give him time and day of payment, by said H. G. Lamar agreeing to pay him more than legal interest for such indulgence.

On the trial, the defendant having first released Henry G. Lamar from all liability over on said *fi. fa.* offered him as a witness to prove that John Lamar was only security on the note upon which the *fi. fa.* was founded.

Plaintiff objected to him, on the ground that he was a party to the record and interested in the issue; and upon the further ground, that the administratrix of John Lamar was not the proper person, and had not the power, as administratrix to release the witness. The Court over-ruled the objection, and plaintiff excepted.

The Court charged the Jury, "that it was not competent, under the law, to carry a *fi. fa.* to a county remote from the residence of defendants, where they had property, and procure in this remote county, where they had none, the entry of 'no property' in order to keep the *fi. fa.* open; such an act would be a fraud on the Statute; that the policy of the law had in view the entire settlement of old *fi. fas.* within the period of every seven years." To which charge of the Court plaintiff excepted.

WHITTLE; COLE, for plaintiff in error.

STUBBS & HILL, for defendants in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] The point first made in this case presents the question, whether or not the mere fact that the name of a witness appears as a party upon the record, is sufficient to exclude his testimony, even though he has no interest in the event.

Having fully discussed this question in the case of *Wooten & Co. vs. Nall*, decided at this term of the Court, it is unnecessary for us to add the reason for our decision in this case. We content ourselves, therefore, with referring to the judgment delivered in that case, for the reasons which influence us to decide that the Court below was right in holding, that if Col. Lamar had no interest in the suit, he was not incompetent as a witness, because he was nominally a party to the same.

[2.] But it was also objected that the administratrix of John Lamar had no authority, as administratrix, to release the witness; and that such a release from the administratrix, if it were lawful, did not relieve the witness from liability to the plaintiff.

We have no difficulty in recognizing the right and power of an administrator, or administratrix, to do any such act for the benefit of the estate. Of course, he or she acts at his or her peril. If the act be for the interest of the estate, or if it be what should reasonably have been done, under the circumstances, for the promotion of the best interests of the estate, the law will sustain and protect the trustee in the exercise of such authority.

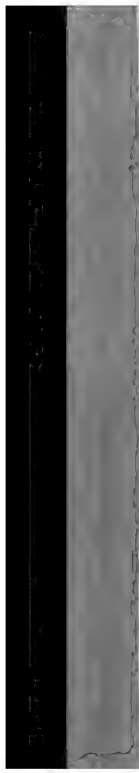
It is true that the release in question did not relieve Col. L. from liability to the plaintiff; and therefore, he could not be a competent witness to testify, generally, in the case. He might have been allowed to testify as to the character in which John Lamar signed the note, as this did not affect his liability to the plaintiff. The release, thus, would remove all interest springing out of his relations to the other parties in

the case, and render him competent to show the fact of the character in which John Lamar signed the note.

[3.] But we are clearly of opinion that the Court erred in holding that Col. Lamar could be a competent witness in this case, to testify generally, and thus to prove circumstances, the effect of which was to show, or was intended to show, that the judgment was dormant. Of a consequence, the result from such proof, if it were credited, would be the release of the parties from liability on the judgment. The record could be used in favor of the witness; and he would, therefore, be interested in making such proof.

[4.] We think, too, that the Court erred in charging the Jury, in substance, that the Act of our Legislature of December 19th, 1822, commonly called the Dormant Judgment Act, had in view the settlement of executions within the period of every seven years, if defendants had property sufficient to satisfy them; and that some effort to have the same satisfied, must be made within that period, and shown by the return of the proper officer.

We are by no means prepared to hold that a judgment creditor may not, in good faith, indulge his debtor beyond the period of seven years, and have a return, in good faith, made by the proper officer, for the purpose of showing part payment, or execution to a certain extent. On the contrary, we hold that the Act was passed, as it shows for itself, to prevent fraudulent collusion between parties to judgments, for the purpose of wrongfully enforcing such judgments to the injury of *bona fide* creditors, and that this was the mischief, and the only mischief, intended to be remedied.



INDEX TO VOLUME XVIII.

ADMINISTRATORS, EXECUTORS, &c.

1. An administrator, after settlement with the distributees, makes a return to the Court of Ordinary of the settlement, and of other matters occurring before the settlement: *Held*, that this return does not show a continuing trust, so as to take the case out of the Statute of Limitations. *Walker et al. vs. Wooten et al.*..... 119

2. Interest should be charged on advancements, only from the time they are brought into hotchpot. *Harris et al. ex'rs. vs. Allen*..... 177

3. By the Act of 1805 a surety of an administrator may petition for and have relief by counter security or otherwise, as matter of right. This Act is not repealed by Act of 1810. *Girardey and another vs. Dougherty*..... 253

4. Such relief cannot extend to the revocation of the administrator's letters, unless, under the provisions of the Act of 1810, notice is given and proof made of mismanagement. *Ibid.*

5. A judgment of dismissal by the Ordinary, relieves the administrator from all liability, unless such judgment be impeached in that Court for irregularity, or in the Superior Court for fraud. *Jacobs vs. Pou, adm'r*..... 346

6. After dismission, the Statute of Limitation runs in favor of administrators and against distributees. *Ibid.*

7. When there is doubt whether assets are to be administered by the laws of this or another State, the administrator may apply to a Court of Equity for direction. *Sanford, adm'r, &c. vs. Thompson et ux...* 554

8. If assets are to be administered according to the law of another State; and if all the claimants reside in that State, it is proper that they should be transmitted to the administrator in that State, to be, by him, administered. *Ibid.*

9. For injuries to property in *actual* possession, administrator, &c. may sue in his own name: *Aliter*, where the possession is *constructive*. *The Macon & Western R. R. Co. vs. Davis, adm'r*..... 679

10. Admissions by administrators, &c. in relation to matters in litigation, are admissible against the estate. If they injure the estate they are liable. *Sample vs. Lipscomb* 687

11. So, an administrator may release a witness, so as to make him competent. *Neal vs. Lamar et al*..... 745.

See *Judgment*, 1. *Laches*, 3. *Trusts and Trustees*, 1, 2.

ADMISSIONS.

See *Administrators, &c.* 10.

ADULTERY AND FORNICATION.

1. An indictment lies against one person for this offence. *Wasden vs. The State*..... 264

ADVANCEMENTS.

See *Administrators, &c.* 2.

ALIMONY.

See *Husband and Wife.*

AMENDMENT.

1. Action for land under Act of 1847, is not amendable by inserting other parties. *Neal vs. Robertson*..... 399

See *Appeals*, 1.

APPEALS

1. Are included in the Act of 1818, as to amendments and special pleading. *Burkhalter vs. Bullock*.....371

2. Where the appellant and his surety sign their names upon the minutes of the Court for the Clerk to write the bond above, which he failed to do: *Held*, that it is a good appeal. The omission may be supplied at any time. *Hooks vs. Stamper*.....471

3. Under the charter of the Oglethorpe B. & T. Co. appeals are to be entered by the next term of the Court. *Armstrong vs. The O. B. & T. Co*.....607

See *Judgment*, 2. *Sheriff and Sureties*, 1.

ASSUMPSIT.

1. Where the terms of a special agreement have been performed on one side, and nothing is to be done on the

other but to make a money payment, such payment may be enforced by *indebitatus assumpsit*. *Hancock vs. Ross*.....364

4. Where goods have been supplied under a special agreement, but not in conformity thereto, compensation may, nevertheless, be enforced by action of *assumpsit*, if defendant has retained and used the goods actually furnished. *Ibid.*

5. K paid an account for medical services rendered to the son of D, and brought suit for the money: *Held*, that he could not recover without proving that the exigencies of the case required the services of a physician, or a special request. *Keaton vs. Davis*.....457

6. Asst. *vs.* two. At Common Law, judgment cannot be given against one; otherwise, under our laws. *Wooten & Co. vs. Nall*.....609

ATTACHMENT.

1. Attachment and bail for the same matter, cannot be sued out at the same time. *Clark vs. Tuggle*.....604

2. An affidavit for a sum certain, "subject to an unascertained set-off for work," is sufficient. *The Holston Man. Co. vs. Lea*.....647

3. An Attorney, by surety, need not show "that ordinary process of law cannot be served." *Shockley vs. Bullock*.....283

4. If no form is prescribed, a substantial compliance is sufficient. *Ibid.*

ATTORNEY.

See Evidence, 12. *Set-off*, 1.

BAIL.

1. A suit upon a bail bond (not good under the Statute) alleged, that it was voluntarily tendered. No evidence but the bond was offered: *Held*, that a non-suit was properly awarded. *Sackett, Davis & Potter vs. Tucker et al.*.....401

2. Where bail is required by an agent of the plaintiff, who swears he is agent, and the principal files his declaration on this affidavit: *Held*, that this is evidence that the principal authorized the act. *Murphy vs. Winter & Co.*.....690

See Attachment, 1.

BAILMENT.

1. The undertaking of a party to receive money and deliver it to another, without reward, is a mandate; and in contracts of this sort, the mandatory is liable for gross negligence only. The burthen of proof is thrown upon the plaintiff to make out at least a *prima facie* case. *McNabb vs. Lockhart & Thomas*.....495

2. Negligence is ordinary, less than ordinary or more than ordinary; and he who omits even slight diligence, fails in the lowest degree of prudence, and is deemed grossly negligent: his conduct being, in legal language, *dolo proximus. Ibid.*

3. He who accepts a burden gratuitously, is not to be dealt with as one who receives a benefit; and whether he has been grossly negligent, is a fact to be determined by the Jury. *Ibid.*

4. In an action against such a bailee, for the loss of money by negligence, the defendant may give in evi-

dence his own acts and declarations immediately after the loss, to repel the charge. *Ibid.*

5. He cannot be sworn as a witness to prove the loss. *Ibid.*

6. Where, in such a suit, the plaintiff proves the buying and selling of property, and handling of funds after the alleged loss by defendant, he may rebut by proof of his pecuniary means before the loss. *Ibid.*

7. He may put in evidence his general character for honesty and trustworthiness. *Ibid.*

See *Slaves, &c.* 2.

BANKS AND BANKING.

1. The right of creditors to call on the State of Georgia for the unpaid stock due by her, was taken away by the Act of 1834, extending the charter of the bank. *Robinson et al. vs. The State*..... 65

2. A bank may, of necessity, receive its own stock in payment of a debt. This becomes a fund for the creditors of the bank. The other stockholders are not liable for unpaid instalments due on such stock. *Ibid.*

3. All reasonable expenses of a receiver of the assets of an insolvent bank are legitimate charges against the trust fund. *Ibid.*

4. Debts due to a bank may be discharged in its own notes, even after transfer, or after judgment. *Ibid.*

5. Bank bills should be protected in preference to every other class of debts—and Statutes passed for this purpose should be liberally construed. *Ibid.*

6. The State, by becoming a stockholder in a bank, while it does not extend to the bank her privileges or prerogatives; still, it does not divest her of her sovereign rights as a creditor. *Ibid.*

7. The State having redeemed more than her share of the bills of the Bank of Darien, no farther liability attaches to her as a stockholder. *Ibid.*

8. Bank notes, although fraudulently put into circulation or even stolen, become the property of him who gives a valuable consideration for them, *bona fide*. *Ibid.*

9. A party who proves the loss of a bank note, is entitled to require payment thereof of the bank, by tendering suitable indemnity. *Ibid.*

10. The 4th part of the 6th section of the charter of the Pl. & Mech's Bank of Columbus, is in these words: "The total amount of debts which the said corporation shall at any time owe, by bond, bill, &c. shall not exceed three times the amount of capital stock actually paid in, over and above the amount of specie in the vaults actually deposited for safe-keeping. In case of excess, the directors, under whose administration it shall happen, shall be liable for the same in their private and individual capacities, and may be sued for the same in any Court of record in the United States, by any creditor of the corporation, any condition, covenant or agreement to the contrary notwithstanding; but this shall not be so construed, &c.:" *Held*, that the liability of the directors is not *penal* but *remedial;* joint and not several; and neither absence nor dissent will relieve a director from liability. *Banks vs. Darden*..... 318

11. The charter of the P. & M. Bank of Columbus does

not require that the whole amount of the capital stock should be paid in specie, but only 25 per cent. thereof. And in order to charge the directors, it must be shown that there was an excess, and that it happened during their administration. *Ibid.*

12. Where the charter of a bank required that twenty-five per cent. in specie should be paid in before the board of directors should proceed to issue their notes, and this was never done: *Held*, that the corporation could not plead the illegal organization, to a suit by an innocent bill-holder; the liability of the stockholder being incidental to that of the bank, he is estopped also. *McDougald, adm'x, vs. Lane*..... 444

See, also, *McDougald, adm'x, vs. Bellamy, adm'r*.....411

13. The liability of the stockholder in such a case, is not secondary and collateral to that of the directors, for an excess of issue, where the charter makes the directors liable for such excess. But the liability is joint and several with that of the directors. *Ibid.*

14. In such a case, the exemplification of a suit against the bank, is some evidence of the identity of the bills sued on. *Ibid.*

15. If the bill-holder participated in the fraudulent organization of the bank, he cannot recover of the other stockholders. *Ibid.*

See, also, *McDougald vs. Bellamy*..... 411

16. The defendant's Attorney is not entitled to an order requiring the bills sued upon to be deposited in Court until after final judgment. *Ibid.*

17. All who were at any time stockholders in the P. &

M. Bank of Columbus, are liable to bill-holders, unless they have given the notice required by the charter. *McDougald, adm'x, vs. Bellamy, adm'r*..... 411

18. A stockholder ceases to be such, *inside the charter*, so soon as he transfers, whether he gives the notice or not. *Ibid.*

19. Can a stockholder who has transferred, and is a bill-holder, sue the others for the redemption of his bills? *Query. Ibid.*

20. Liability of corporations for the *torts* and wrongs of their directors and other agents. *Ibid.*

21. The Legislature may pardon an illegal organization of a bank. *Ibid.*

See *Equity*, 9, 10. *Promissory Notes*, 2.

BOND.

1. A bail bond in a criminal case for the appearance of A B, "to answer the charge, and well and truly abide by the finding of the Court in the premises," is not broken until indictment found. *Liceth et al. vs. Cobb, Gov. &c*..... 314

See *Bail*, 1. *Tax and Tax Collectors*, 1.

CERTIORARI,

1. Does not lie to decision on a possessory warrant. *Heard vs. Heard*..... 739

See *Practice Supr. Ct.* 5.

CHARGE OF THE COURT.

1. The charge is not "hypothetical," where there is any evidence to sustain it. *Willis vs. Willis*..... 13

2. It is not error for the Court, in its charge, to assume as true what is admitted to be true. *Walker et al. vs. Wooten et al.*..... 119

3. If a charge is requested and the Court, in reply, reads a decision of the Supreme Court, Counsel should request an aditional charge, if the decision does not cover the whole ground. *Wright vs. The State*..... 383

4. Professional ethics and courtesy. *Ibid.*

5. When the Court has charged fully, and the Jury return for instructions on a particular point, the Court is not bound to go over all that part of his charge favorable to the prisoner. *Hatcher vs. The State*..... 460

6. It is not error to refuse a charge not warranted by the testimony. *McDougald, adm'x, vs. Bellamy, adm'r*..... 411

7. It is no objection to a correct charge, that it does not go farther. *Durand vs. Grimes*..... 693

8. It is error for the Court, in summing up, to refer only to the testimony on one side. *Leary vs. Leary*..... 696

See *Criminal Law*, 6.

CITIZENSHIP.

See *Evidence*, 7.

CONFLICT OF LAWS.

1. The laws of one State have force in the territory of another, so long as they do not come in conflict with the power or right of that State, or any of its citizens. *Sanford, adm'r, vs. Thompson et al.*..... 554

2. The *lex loci* applies only to the construction of contracts—not to the remedies on them. *Joyce vs. Scales.* 725

See *Administrators, &c.* 8.

CONSTITUTIONAL LAW.

1. An Act "to extend the charter of a corporation" by usage, includes the terms on which the extension is granted. *Robinson et al. vs. The State*..... 65

2. An unconstitutional Act may nevertheless operate as notice to those acting under it. *Ibid.*

3. The General Assembly have the power to regulate and prohibit the retailing of spirituous liquors, and may delegate that power to municipal corporations. *Perdue, Clerk, &c. vs. Ellis*..... 586

4. The *lex loci* applies to the interpretation of contracts, not to the remedies on them. Under this rule, if a party be discharged from imprisonment only, he remains liable for the same debt in another State. *Joyce vs. Scales*..... 725

5. This rule is not in conflict with that clause of the Federal Constitution, declaring that "full faith and credit," &c. That applies only to *pleadings and evidence. Ibid.*

See *Grant*, 1. *Jurisdiction*, 2.

CONTINUANCE.

1. The Act of 1853–'4, relative to continuances, does not require the party to state, *under oath*, what he expects to prove by the absent witness. It only requires it to be reduced to writing. *Banks vs. Darden*..... 318

2. Absence of Counsel is not a favored ground, especially where able Counsel are associated; and the party must always swear he expects to get his assistance at the next term. *Wright vs. The State*..... 383

3. Popular excitement is no ground, after the first term; and if renewed by defendant's escape and recapture, it is still no ground. *Ibid.*

4. A witness must be proven to be subpœnaed—information will not do. *Ibid.*

5. The Court may send for witnesses if within reach; and if found to be fictitious, may force a trial. *Poole vs. The State*..... 567

6. Public excitement is no ground in small offences. *Ibid.*

See *Insolvent Debtors*, 1.

CONTRACTS.

1. Distinction between contracts between parties and liabilities *ex quasi contractu*. *Banks vs. Darden*..... 318

See *Assumpsit*, 2.

COUNTY TAX.

See *Tax and Tax Collectors.*

CRIMINAL LAW.

1. There may be cases of manslaughter in which there was no assault by the person killed upon the person killing. *Stokes vs. The State*..... 17

2. A prisoner is entitled only to a list of the witnesses sworn before the Grand Jury. *Keener vs. The State.* 194

3. Where previous threats, without any overt act, are sought to be used as a justification, they must be brought home to the prisoner: *Aliter*, where they are used merely to show the state of feeling on the part of the deceased. *Ibid.*

4. Verdicts find the *criminal*, not the *naked* fact. Hence, the Jury must pass on the law as well as the fact. *Ibid.*

5. If a homicide is committed by one laboring under the fears of a reasonable man, that a felony was about to be committed on him, it is justifiable. If the fears are of any injury less than a felony, the offence is manslaughter, and not murder. *Ibid.*

6. The duty of the Judge in charging in criminal cases. *Ibid.*

7. The doctrine of reasonable doubts extends to cases of every degree. *Wasden vs. The State*..... 264

8. In an indictment for killing a Deputy Sheriff, the official character of the deceased need not be alleged. *Wright vs. The State*..... 383

9. The judgment will not be arrested because the indictment was not read to the Jury. *Ibid.*

10. Nor because the initials only of the names of three of the *nineteen* Grand Jurors are set out in the indictment. *Hatcher vs. The State*..... 460

11. A demand for trial may be made at any time during the term, provided there is a Jury empannelled qualified to try the case, and before the Jury is discharged. *Jordan vs. The State*..... 532

12. Doubts expressed to the construction put upon this section of the Code, in *Denny vs. The State*, 6 *Ga.* 491. *Ibid.*

13. Accomplices—when admissible as witnesses. *Armistead vs. The State*..... 704

14. When two are indicted for a homicide, and the trial of one progressing, evidence that the decedant said that the other "did not touch him" in the fight, is irrelevant. *Ibid.*

15. The rules which justify self-defence extend, under the 16th sec. of 4th div. of the Code, to the relation of brother and sister, and brother and brother. *Ibid.*

16. *Hudson* and *Hutson* are *idem sonans*. *Chapman vs. The State*.....736

17. Upon an indictment for gaming, the State may prove the offence at any time within the Statute of Limitations. *Ibid.*

See *Adultery and Fornication*. *Bail*, 1. *Continuance*. *Evidence*, 25. *New Trial*, 6. *Practice Superior Court*, 6. *Slaves, &c.* 1. *Surprise*, 1.

DECEIT.

1. The *scienter* is necessary to sustain the action for false representations. *Manes vs. Kenyon*.....291

2. "Fraudulently" is an equivalent allegation. *Terrell vs. Bennett*.....404

DEED.

See *Evidence*, 2, 11. *Estoppel*, 1, 2, 3.

DEVISE AND LEGACY.

1. B gave all his property to his ex'r, for the support and maintenance of his family, in the first instance; then directed that if either of his children should die after marriage, without leaving issue, the wife of such child should have $500; next, that as his children arrived at age or married, his ex'r should give off to such child such portion of the estate as he thought best, but the title to such portion should not be divested from his estate, nor such child acquire any title thereto; but the property was to belong to his estate until the youngest child should marry or come of age, and then should be brought into the general fund and divided among all his children, equally, share and share alike. If all his children died without leaving issue, a devise over. One of his sons died, after arrival at age, but before the youngest arrived at age or married: *Held*, that the adm'r of such child, so dying, could recover no portion of the *corpus* of the estate, but the same vested in the children surviving when the youngest arrived at age or married. *Cogburn, adm'r, vs. Ogleby, adm'r*..... 56

2. Where a will gives to certain persons all of the proceeds of a sale, after providing for a specific object,

and that object fails because the provision is void: *Held*, that the legatees take the entire proceeds of the sale. *Adams, guar. vs. Bass, ex'r*..... 130

3. Where a testator directs certain funds to be invested in bank stock, and gives the dividends, without limitation, to certain persons and their heirs: *Held*, that the legatees take the *corpus*, and that it is optional with them to take it before or after the investment in bank stock. *Ibid.*

4. Bequests to wife for life, and if daughter should be dead at the death of her mother, without issue, or afterwards die, leaving no issue, then over: *Held*, that the daughter takes a contingent and not a vested interest; and at any period before death of mother, the remaindermen over might maintain a bill praying a stay of waste. *Griswold et ux vs. Greer et al*..... 545

5. The words "dying leaving no issue," must, in Georgia, be construed to import a failure of issue *at the death*. *Ibid.*

6. Whether the issue of a female slave bequeathed, born after the making of the will, passes to the legatees, depends upon the intention of testator, to be gathered from the will. *Harrell vs. Greene*..... 711

See *Slaves, &c.* 1.

DISCOVERY AT LAW.

1. Where good cause is shown for not answering, the Court may grant continuance or put the party on other terms. *Bartee vs. Andrews*..... 407

DIVORCE,

1. In an action for, by the husband, the conduct and

conversation of the wife, at the sick bed of her alleged paramour, are admissible in evidence. *Leary vs. Leary* 696

2. The husband cannot make evidence, by making assignations by letter over the wife's name, and then proving that the person to whom they were addressed had repaired to the spot. *Ibid.*

3. Declarations of the suspected paramour, not made in the wife's presence, are not admissible against her. *Ibid.*

4. The husband may prove that he knew nothing of the report of his wife's misconduct until it was generally known in the neighborhood. *Ibid.*

5. So, also, he may prove that he promptly dismissed from his house the person suspected. *Ibid.*

See *Husband and Wife.*

DOMICIL.

See *Guardian and Ward*, 1.

EQUITY.

1. While it is the favorite policy of Courts of Chancery to distribute all the assets of an insolvent debtor *pari passu;* yet, when a judicial preference has been established by the diligence of one creditor, that preference will be observed. *Robinson et al. vs. The State of Georgia* 65

2. Though *equitable* assets should be distributed rateably; yet, it is otherwise as to *legal* assets. *Ibid.*

8. The broad and most sensible distinction between *legal* and *equitable* assets is, that the first can be reached by *legal* remedies; the last cannot. *Ibid.*

4. The party seeking to open an account, has upon him the *onus* of showing error, arising either from fraud, accident or mistake. *Walker et al. vs. Wooten et al.*. 119

5. Specific performance of a personal contract will not be decreed, unless irreparable injury will otherwise result. *The Justices, &c. vs. Croft*..... 473

6. Equity has jurisdiction to restrain a party from raising a mill-dam, to the injury of another's health. *Norwood vs. Dickey*..... 528

7. A purchaser of a lot of land at Sheriff's sale, who loses the land by a superior title, cannot, in Equity, enjoin the Sheriff from paying over the proceeds of the sale to other *fi. fas.* of the plaintiff against the defendant, without charge of fraud. *Methvin vs. Bexly et al*..... 551

8. A bill which seeks to have applied to the plaintiff's demand, exclusively, a fund in which all of the defendants are interested, is not multifarious. *Lavender et al. vs. Thomas et al*..... 668

9. The parties to a contract prayed to be specifically performed, are proper parties to the bill. *Ibid.*

10. There are cases in which, in Equity, a party may be sued out of the county of residence, (e. g.) as where, otherwise, no decree can be rendered. *Ibid.*

See *Administrators, &c.* 7. *Injunction. Laches. Mortgages*, 3. *Partners*, 1, 2.

EQUITY PRACTICE & PLEADING.

1. The representatives of a deceased defendant to a bill, who has answered during his lifetime, file pleas in bar, and an order is taken that the pleas and answer "stand for a hearing at the final trial;" subsequently, complainant moved to take the pleas from the file—1st. Because an answer had been previously filed. 2d. Because they are not sworn: *Held*, that the motion should be over-ruled. *Walker et al. vs. Wooten et al.*..... 119

2. On a bill to construe a will, where the will contains clauses seeking to grant foreign emancipation to certain slaves: *Held*, that the Court would not allow either a next friend or The American Colonization Society to be heard in behalf of the slaves. *Hunter and American Colonization Society vs. Bass, ex'r*..... 127

3. If the answer swears off only a part of the equity, the injunction may be dissolved *pro tanto*. *Edwards and Perryman et al*..... 374

4. If a married woman is the chief beneficiary under a bill filed by her trustee and next friend, she is entitled to be consulted as to its dismissal, and no act of the trustee will be suffered to prejudice her rights. *Ibid.*

5. If a complainant puts, in the shape of a supplemental bill, that which properly should be in the form of a petition for an interlocutory order, the Chancellor will still shape the proceedings so as to give proper relief. *Miller et al. vs. Sanders et al*..... 492

6. If the complainant inaccurately denominate the writ asked for, a "writ of *quia timet*," yet, if the prayer is

appropriate to a bill of *quia timet*, and the proceeding is sufficient in other respects, the Chancellor may act upon it. *Ibid.*

7. Where a proceeding is based upon an original bill, the allegations of such original bill should be set out. *Ibid.*

8. It is deficient, also, if it seeks bond and security for the defendant's appearance with the property, without setting out the value of the property. *Ibid.*

See *Husband and Wife*, 2.

ERROR

1. Does not lie to the admission of evidence unobjected to. *Burtine vs. The State* 534

2. Does not lie where an appeal is entered. *Jones et al. vs. Crawford, ex'r* 281

3. Though the Court errs in rejecting a set of interrogatories, yet, if another set is sued out and no harm done, the judgment will not be reversed. *Leary vs. Leary* 696

ESTOPPEL.

1. Under modern conveyances, with or without warranty, title to land subsequently acquired does not pass to the grantee by estoppel. *Way vs. Arnold* 181

2. Are not our Registry Acts a virtual repeal of the doctrine of estoppel? *Ibid.*

3. B makes a deed to C. and afterwards conveys the

same land to T. The younger deed is recorded. The older is not: *Held*, that T, the donee in the younger deed, is not estopped from saying that B had not conveyed to C. *Faircloth vs. Jordan*..... 350

EVIDENCE.

1. In cases for libel and slander, an exception is made to the general rule; and witnesses may state their inferences, how they understood the words to be spoken. *Hawks vs. Patton*..... 52

2. If a deed is made, referring to a plot of re-survey, which is not attached, parol evidence is admissible to identify the plot. *Way vs. Arnold*..... 181

3. Ordinarily, a witness must state facts, and not his opinion or expectation, which is a conclusion from the the facts. *Keener vs. The State*..... 194

4. Where the character of a party as to any particular trait, or as developed under special circumstances, is put in issue, it must be proven by evidence of general reputation, and not positive evidence of general bad conduct. Is there any material difference? *Query. Ibid.*

5. All the circumstances of a transaction may be submitted to the Jury, provided they afford any fair presumption as to the matter in issue. *Ibid.*

See, also, *Sample vs. Lipscomb*..... 685

6. Threats—when and for what purpose visible. *Ibid.*

7. A certificate of the Clerk of the Superior Court, that an alien had, in all things, complied with the law, and had taken the oath of naturalization, and been

admitted as a citizen, is not sufficient proof of naturalization. *Miller vs Reinhart*..... 239

8. Upon an issue of *devisavit vel non*, where undue influence is alleged to have been exerted by the step-mother, to the injury of the children; and it is in evidence, that "bad feeling" existed between the step-mother and one of the children, it is admissible for the witness to explain the cause of the bad feeling; and the withholding of this evidence is ground for a new trial, under the Act of 1853–'4. *Cox vs. Rutledge et al*..... 294

9. Bank books are admissible as evidence, both for and against the corporation. It is allowable, however, to prove by *parol*, independent facts, such as the disposition of stock, and the issuing of a large amount of bills or notes. *Banks vs. Darden*..... 318

10. When books are admitted in evidence, they are testimony before the Jury as to all entries appertaining to the same transaction; still, the party offering them may select and read to the Jury such portions as answer the purpose for which he introduced them; leaving it to the other party to bring out any other parts that he may see fit. *Ibid.*

11. The maker of a deed is a competent witness to prove that the deed is a forgery, although it is proven by the subscribing witnesses. *Faircloth vs. Jordan*..... 350

12. The Act of 1850, in reference to the testimony of Attorneys at Law, does not prohibit their testimony, when the information which is sought was necessarily "a matter or thing acquired from his client, or during the existence and by reason of the relationship of client and Attorney." *McDougald, admr'x. vs. Lane* 444

13. It is not a good objection to the deposition of a witness, testifying to services and articles which have been entered in a book, that the book is not produced if he states that the book is lost or destroyed. *Keaton vs. Davis*..... 457

14. What a party says as to the ownership of money, when he delivers the packet for transportation, is admissible as a part of the *res gestæ*. *McNabb vs. Lockhart & Thomas*..... 495

15. Where, from the nature of the case, other evidence was not to be obtained, and there would be a failure of justice without the oath of the party, ought he not to be allowed to testify? *Ibid.*

16. Depositions properly executed, except the omission of the words, "answered, subscribed and sworn to," were objected to on the trial, after laying in office three years: *Held*, that the Court should require the party objecting either to waive or submit to a general continuance. *Dawson vs. Calloway*..... 575

17. Opinions, in general, are not evidence. *Ibid.*

18. A subscribing witness to a deed proved its execution, "as he supposed, for the purposes therein mentioned:" *Held*, sufficient. *Ibid.*

19. Declarations accompanying possession, are good against parties and privies. *Ibid.*

20. A witness examined to one point may be cross-examined as to all. *Ibid.*

21. Papers produced under notice are evidence, when inspected, for both parties. *Wooten & Co. vs. Nall*... 609

22. Receipts and other papers are admitted upon no

other proof than the presumption of their fairness, founded on human experience. *Ibid.*

23. Parties to the record when a witness. *Ibid.*

24. A party not appealing, may be a witness for co-defendant appealing. *Ibid.*

25. Declarations of slayer of runaway slave, as to the facts, made immediately afterwards, are admissible as part of the *res gestæ*. It is for the Jury to say whether made with a view to color the transaction. *Hart vs. Powell* 635

See *Administrators, &c.* 10. *Bailment*, 4 *to* 7. *Banks, &c.* 14. *Criminal Law*, 14. *Divorce. Discovery at Law. Laches*, 8. *Practice Superior Court*, 1, 2. *Promissory Notes*, 2. *Witnesses.*

FRAUDULENT ASSIGNMENTS.

1. Mortgages are not included in the provisions of the Act of 1818. *Lavender et al. vs. Thomas et al.*..... 668

2. Reducing a note to small notes of $30 each, in order to give a preference to one creditor, is not forbidden by that Act. *Ibid.*

GARNISHMENT.

1. Debts secured by negotiable notes may be the subject of garnishment. *King and another. vs. Carhart, Bros. & Co.* 650

2. A transfer of notes as *collaterals*, places them beyond the reach of subsequent garnishments. *Ibid.*

3. If a garnishee answers that he is satisfied his note

was transferred before service of the summons, judgment cannot go against him. *Ibid.*

GIFT.

See *Loan*, 1.

GRANTS.

1. The Act of 21st December, 1843, limiting the time in which grants should be taken out for lands drawn by orphans, &c. is not unconstitutional. *McKinney et al. vs. Compton*..... 170

2. The time from which the circulation runs, is from the date of the drawing, and not from the close of the lottery. *Ibid.*

GRIFFIN—CITY OF.

1. Its retail license ordinance is constitutional and valid. *Perdue vs. Ellis*..... 586

2. Authority of its council to file a bill to assert the rights of the city to certain lots dedicated by the Monroe Rail Road Company. *Cox vs. the Mayor, &c.*.... 725

GUARDIAN AND WARD.

1. When the ward comes to years of discretion, the residence of his guardian is not his residence, unless he chooses to make it such. *Roberts vs. Walker*..... 5

HUSBAND AND WIFE.

1. In a libel for divorce, at the instance of the wife, it is the duty of the Court to institute some inquiry as to the authority for bringing the suit, where suspicion

has been cast upon the *bona fides* of the transaction. *Swearingen vs. Swearingen*..... 316.

2. If, upon a verdict rendered, settling property upon the wife and children, a decree is entered, not accurately framed, to carry out the verdict, the decree may, after the death of the wife, be perfected, so as to do what was intended to be done. *Napier et al. vs. Haward et al*..... 437.

3. In a suit for divorce, by the husband, on account of pregnancy of the wife at the time of marriage, the Court should grant temporary alimony, though the husband offers to prove the truth of his allegation. *Frith vs. Frith*..... 273.

See *Divorce. Equity Practice*, 4.

INDICTMENT.

See *Criminal Law*, 8, 10.

INFANT.

See *Will*, 7.

INJUNCTION

1. Does not lie against the Justices of the Inferior Court. *The Justices, &c. vs. Croft* ..... 478.

See *Equity Practice*, 8.

INSOLVENT DEBTORS.

1. The withdrawal of the schedule from the Clerk's office, by the Attorney of the applicant, immediately after its filing, and its detention till Court, may be a

good ground for continuance, but will not support a motion for the imprisonment of the debtor. *Lindsay et al. vs. Hunter*..... 50

2. A schedule, with the oath of the debtor appended thereto, "that he has no property or effects of any kind whatever, except as excepted in the oath prescribed by law," is sufficient. *Ibid.*

See *Constitutional Law*, 4. *Equity*, 1, 2. *Fraudulent Assignments.*

INTEREST.

See *Administrators, &c.* 2. *Trusts and Trustees*, 1, 2.

INTERROGATORIES.

See *Evidence.*

JUDGMENT.

1. A grant of letters of administration may be attacked by showing that the Court had no jurisdiction. *Griffith's Lessee vs. Wright*..... 173

2. A mortgage is an *alienation*, in the sense of the Act of 1822, prohibiting alienations pending an appeal. *Behn & Foster vs. Phillips*..... 466

3. *Nunc pro tunc* judgments may be signed on first verdict, so as not to prejudice the rights of third persons, notwithstanding the 66th Common Law rule. *Perdue vs. Bradshaw*..... 287

4. A judgment creditor may, *bona fide*, indulge his debt-

or more than seven years; and an entry of part payment to the officer, (though defendant may have property sufficient to pay all,) will keep the same from becoming dormant. *Neal vs. Lamar*..... 746

See *Administrators, &c.* 5. *Sheriff and Sureties*, 1. *Wills*, 6, 7.

JURISDICTION.

1. A citizen of another State, may be sued in any county where he may be found, in this. *Murphy vs. Winter & Co*..... 690

2. A motion to set aside a recovery in ejectment, is a suit respecting land, and must be tried in the county where the land lies. *Murdock vs. Little*..... 719

See *Lost Deeds*, 2.

JURY.

1. The mere formation and expression of an opinion, does not necessarily disqualify a Juror. It should be deliberate, fixed and abiding. *Wright vs. The State*..... 383

See *New Trial*, 2. *Practice Superior Court*, 1.

LACHES.

1. Long acquiescence by parties out of possession, is productive of much hardship and injustice to others, and cannot be excused except by showing some actual impediment, caused by the fraud or concealment of the party in possession. *Woolfolk vs. Beatty*..... 520

2. The party guilty of gross laches, cannot screen his

title from the just imputation of staleness, merely under the pretence of an imaginary impediment or technical disability. *Ibid.*

3. A former administration will be presumed to protect the ancient title and possession of personal as well as real estate. *Ibid.*

LEGACY.

See *Devise and Legacy.*

LIEN.

1. The sovereign right of priority of payment to debts due the State, exists in Georgia. It is a wholesome right, and is approved by the Courts. *Robinson et al. vs. The State*..... 65

2. It does not exist here with all the incidents attached to the royal prerogative in England. It does not over-ride an antecedent lien of an individual creditor. *Ibid.*

LIMITATION OF ACTIONS.

1. If, upon a settlement between trustee and *cestui que trust*, the former notifies the latter he owes him more, the Statute of Limitations begins to run from that time. *Walker et al. vs. Wooten et al*..... 119

2. The Statute does not run in favor of an executor *de son tort*, of an executor *de son tort*, where it would not run in favor of the deceased person. *Dawson vs. Calloway* 573

3. The Statute can be pleaded by those in whose favor it runs, and their privies, and by no others. *Ibid.*

See *Administrators, &c.* 1, 6. *Grants*, 2. *Laches.*

LIQUIDATED DEMAND,

1. Whenever rendered certain what and how much is due. This need not be contemporaneous with the agreement. *Bartee vs. Andrews*..... 407

LOAN.

1. Where H loaned property to T and his wife, for the life of the latter, with the understanding that at the death of the latter the same should be returned to his daughter M: *Held*, that this was not an attempt to vest a remainder in M by parol gift, and that she might recover the property at the death of the wife. *Boothe vs. Terrell*... 570

LOST PAPERS.

1. In a proceeding, under 6th section of Judiciary Act, to establish a lost Sheriff's deed, the defendant in *fi. fa.* is a necessary party. *Turner vs. Joiner et al*..... 368

2. A lost deed to land, must be established in the county where the land lies. *Ibid.*

3. The State should be a party, when the lost papers belong to a State case. *Buchanan vs Beekham*..... 527

MANSLAUGHTER.

See *Criminal Law*, 1.

MANUMISSION.

See *Slaves, &c.* 2.

MERGER

1. Does not take place where the person holding the two estates intends that it should not. *Knowles et al. vs. Lawton et al.* 476

MILLDAM.

See *Equity*, 6.

MORTGAGE.

1. If the holder of the equity of redemption takes an *assignment* of the mortgage which is in the process of foreclosure, and goes on with the suit of foreclosure, the equity of redemption does not merge, such not being his intention. *Knowles et al. vs. Lawton et al.* 476

2. The judgment of foreclosure binds not only the mortgagee, but also his vendee, although the latter be not a party. *Ibid.*

3. The purchasers of parts of mortgaged property, have not the right to compel the mortgagee to resort, for his money, *first*, to the part remaining in the hands of the mortgagor. *Ibid.*

4. Judgment cannot be rendered on foreclosure, for instalments not yet due. Resort must be had to Equity. *Jones vs. Lawrence* 277

See *Judgment*, 2.

NEW TRIAL

1. Will be refused, though the preponderance of testimony is against the verdict. It must be "decidedly and strongly." *Willis vs. Willis* 18

2. The disqualification of a Juror, known to the prisoner before he was sworn, is no ground for a new trial. *Keener vs. The State* 194

3. Where the ground taken is tampering with the Jury, and affidavits are offered on both sides, if the case is not made out against the Jury, a new trial will be refused. *Mathis vs. The State*..... 343

4. Though the testimony of a young and inexperienced witness be not free from discrepancies; yet, if there be about it, as a whole, such an air of truth as in the opinion of the Court authorized the Jury to found a verdict thereon, a new trial will not be granted. *Ibid.*

5. Will be granted where the verdict is strongly and decidedly against the weight of evidence. *Burkhalter vs. Wells*..... 367

6. It is the duty of the Judge to have *all* the testimony, in cases of felony, taken down. The omission to do so, is not a good ground for a new trial. *Hatcher vs. The State*..... 460

7. Although it is loose and highly irregular for the Jury, after being sworn, to enter a retail grocery and converse with other persons; yet, if it appears that no injury was done the prisoner, a new trial will not be granted. *Burtine vs. The State*..... 534

8. In trespass, where the Jury find for *the defendant*, and it is conceded that the plaintiff was entitled to nominal damages, a new trial cannot be avoided by tendering one dollar and costs. *Jones vs. The Water Lot Co*..... 539

See *Evidence*, 8.

NOTICE.

See *Constitutional Law*, 1. *Promissory Notes*, 3. *Rail Roads*, 1, 2.

ORDINARY COURTS

1. Are Courts of general jurisdiction over intestates' estates. *Wood and another vs. Crawford*..... 526

PARTIES.

See *Lost Papers*, 1, 3.

PARTNERS AND PARTNERSHIP.

1. Each partner, on dissolution, has equal rights to the assets; and if one takes exclusive possession over the wishes of the other, a receiver will be appointed by a Court of Equity. *Terrell vs. Goddard*..... 664

2. But if such exclusive possession is not shown by the the bill, and the answer denies it, a receiver should not be appointed. *Ibid.*

PLEADING.

1. In a case for words, under the Act of 1847, the form must be followed without material variation, so far as it goes; but there may be explanatory allegations or inuendoes, so as to state the cause of action distinctly. *Hawks vs. Patton*..... 52

2. A statutory remedy, in derogation of the Common Law, must be strictly pursued. *Banks vs. Darden*... 318

3. Suit may be brought, under the Act of 1847, on a note more than six years old, where there is a credit

within six years before suit brought, although more than six years elapsed before the credit was entered. *Hart et al. vs. Holly et al*..... 378

4. Every action is properly brought, in this State, regardless of its form or name, which sets forth plainly, fully and distinctly, the plaintiff's cause of action. *McNabb vs. Lockhart & Thomas*..... 495

5. Rules, as to when administrator, &c. must make profert of letters, and when defendant must plead *ne unques, &c. The Macon & W. R. R. Co. vs. Davis, adm'r*..... 679

See *Amendment*, 1. *Assumpsit*, 1, 2. *Contracts*, 1, 2, 3. *Deceit*, 1, 2. *Rail Roads*, 1, 2. *Trespass*, 1.

POSSESSORY WARRANT.

1. A promissory note is personal property, within the meaning and terms of the Act of 1821. *Coursey vs. Curtis*..... 237

See *Certiorari*, 1.

PRACTICE SUPERIOR COURT.

1. The Jury are not entitled to have in their room a plat, some of the lines of which are in evidence, and the others rejected. *Way vs. Arnold*..... 181

2. Much latitude must be allowed to the Courts, as to the mode of conducting business. Thus, in the admission of testimony, the Court in a proper case may require the party to commence at such a part as may render other testimony admissible. *Hatcher vs. The State*..... 460

3. When there is a conflict of testimony, Counsel, in

conclusion, will not be stopped by the Court because he represents what his witness stated as proven. *Ibid.*

4. Great latitude is allowed to Counsel in forensic discussion; and liberty of speech must not be too much abridged. *McNabb vs. Lockhart and Thomas*..... 495

5. Where the Court orders a writ of *certiorari* to issue, and without fault of the plaintiff or his Counsel, it is not issued, the case should not be dismissed on that account. *Hopkins, Allen & Co. vs. Suddeth et al.* 518

6. It is the right and duty of the Judge to revise and correct the brief of the testimony, in all cases where it is required to be taken down. *Burtine vs. The State*..... 584

7. It is too late, when the cause is submitted to the Jury on the appeal, to demur for mere formal objections. *Durand vs. Grimes*..... 693

8. When Counsel have omitted to read to the Jury a *fi. fa.* and affidavit of illegality, they should be permitted to do so at any time. *Wadsworth vs. Thomas, adm'r*..... 709

See *Banks, &c.* 16. *Evidence*, 16, 20. *Judgments*, 3. *Sheriff*, 2, 3, 4.

PRINCIPAL AND AGENT.

See *Bail*, 2.

PRINCIPAL AND SURETY.

See *Administrators, &c.* 3, 4. *Sheriff and Sureties*, 1.

PROMISSORY NOTES.

1. If A's title to negotiable paper be good, and he transfers to B, a demand by A or his agent will enure to the benefit of B. *Banks vs. Darden*..... 318

2. Parol evidence is admissible to show that the payee is fraudulently enforcing the note against the maker, after the consideration has failed. *Smith and another vs. Brooks*..... 440

3. Notes payable at bank agencies are bankable paper, in contemplation of the Act of 1826; and notice must be given to indorsers to charge them. *Butler vs. The Mar. & F. Ins. Bank*..... 517

See *Garnishment. Possessory Warrant.*

RAIL ROADS.

1. The fifteen days specified in the Act of 1853–'4, defining the liability of rail road companies, &c. within which notice is to be given or suit brought for the injury complained of, applies exclusively to cases where the demand is under thirty dollars. *Jones vs. The Central R. R. & Co*..... 247

2. The notice to be given under this Act, must be in the name and by the authority of the party aggrieved: and a declaration in the usual form, with process attached by the Clerk and served by the Sheriff, will not be deemed a sufficient compliance with the Act. *Ibid.*

3. Rule as to diligence to be used by R. R. Cos. in passing crossings, and when negligence of the other party excuses them. *The Macon & Western R. R. Co. vs. Davis, adm'r*..... 679

RECEIVER.

See *Partner*, 1.

REMAINDER.

See *Loan*, 1.

RESIDENCE.

See *Guardian and Ward*, 1.

RETAIL LICENSE.

See *Constitutional Law*, 3.

RIPARIAN RIGHTS.

1. Every riparian proprietor above the ebb and flow of tide water, is entitled to the land covered by the water, to the middle thread of the river. On the Chattahoochee, this extends to the boundary of the State on the western bank. *Jones vs. The Water Lot Co*..... 539

SET-OFF.

1. An Attorney ruled for money collected for the Central Bank, may set off fees due to him by the State. *Powers vs. The Central Bank*.... 658

SHERIFF AND SURETIES.

1. A judgment is recovered against the Sheriff and his sureties. He alone appeals, and on the final trial obtains a verdict in his favor: *Held*, that the first judgment cannot be enforced against the sureties. *Beall et al. vs. Cochran, adm'r*..... 38

2. It is too late, after judgment upon an issue joined, for the Sheriff to complain of the uncertainty of the rule *nisi* taken against him. *Brannon vs. The Central Bank*..... 361

3. It is usual to call on the Sheriff first to give an account of his action, and then to move for him to show cause why he should not be attached for contempt; still, if both be combined in the same rule, it will not be set aside as erroneous. *Ibid.*

4. A rule *nisi vs.* Sheriff, omitted to be entered on the minutes, may be entered *nunc pro tunc*. *Ibid.*

5. A rule will not be made absolute against the Sheriff for failing to levy, unless the movant shows that he has been *injured* by the failure. *Currell vs. Phillips* 469

SHERIFF'S SALE.

See *Equity*, 7.

SLAVES AND FREE PERSONS OF COLOR.

1. For the definition of offences committed by slaves and free persons of color, recourse must be had to the Penal Code of 1853, and not to the Criminal Code of the Common Law. *William* (*a slave*) *vs. The State*.. 356

2. If one, without any contract of employment, puts another's slave to a hazardous service, in which his life is lost, he is responsible for his value, with interest. *Collier vs. Lyons*..... 648

3. It is lawful to hunt runaway slaves with dogs, provided it be done with due caution and circumspection. *Moran vs. Davis*..... 722

4. B, by his will, directed that land should be purchased in Indiana or Illinois, and that his executors remove all of his negroes to said land. He also provided for an outfit of farming utensils, &c. for the negroes: *Held*, that as the directions could not be literally carried out, (Indianna and Illinois both prohibiting the introduction of free negroes,) the will could not be carried out *cy prês*, and that testator died intestate, as to the negroes. *Adams, guar. vs. Bass, ex'r*..... 130

5. A bequest, as follows: "As manumission is forbidden by the laws of this State, (which I could have wished otherwise,) I bequeath to W E M, my faithful servants, C and S, to him and his executors forever, in fee, with the very urgent request that he and they will treat said negroes kindly and affectionately, and watch over and protect them, finding them a comfortable home and allowing them as many privileges and liberties as the laws of the State will permit negro slaves to possess or enjoy:" *Held*, that this is not in conflict with our laws against manumission. *Harden et al. vs. Mangham, ex'r*..... 163

See *Devise and Legacy*, 6. *Equity Practice*, 2.

STATUTES.

See *Wills*, 1.

SURPRISE

1. Is a good ground for setting aside an order of the Court founded in mistake. *Winter vs. The State*... 275

SURETIES.

See *Principal and Surety.*

TAX AND TAX COLLECTORS.

1. A county tax cannot be levied without the prior recommendation of the Grand Jury. And a bond given by the Collector, for the due collection of a tax not thus levied, is void. *Reynolds et al. vs. Lofton et al.* 47

TRESPASS.

1. In an action of trespass, the defendant may claim the *locus in quo* to be his freehold, or the freehold of a third person, by whose authority he entered. *Jones vs. The Water Lot Co.* 539

See *New Trial*, 8.

TRUSTS AND TRUSTEES.

1. In settling the accounts of trustees, simple interest is the rule—compound interest the exception. *Hamilton vs. Reese, adm'r* 8

2. Mere negligence will not justify rests. There must be corruption or gross delinquency. *Ibid.*

3. The Act of 1854, to extend the provisions of the 5th section of the Act of 18th February, 1799, to trustees and their estates, gives a remedy against the executors and administrators of trustees, but none against the trustees themselves. *Hampton vs. Hampton* 513

See *Limitation of Actions*, 1.

VERDICT.

See *Criminal Law*, 4.

WAIVER.

See *Sheriff*, 2.

WIFE'S EQUITY.

See *Husband and Wife*, 2.

WILLS.

1. The Act of 1852, requiring three witnesses to wills of personalty, applies to wills made before that time, where the testator dies subsequently. *Sutton vs. Chenault*..... 1

2. By the words *credible* witnesses, in the Statute of frauds, *competent* witnesses is meant. The will may be set up though the witnesses swear to the incapacity of testator. *Hall vs. Hall*..... 40

3. Where the witnesses swear to the attestation in the actual presence of testator, this is sufficient proof of mental presence, unless controverted by definite evidence. *Ibid.*

4. A testator has testamentary capacity though in a sinking and dying state, if, when his attention is aroused to the making of his will, his mind acts definitely and with discriminating judgment. *Ibid.*

5. A will attested by three persons, one of whom signs the name of another at his request: *Held*, insufficient. *Horton and another vs. Johnson et ux*..... 396

6. A will without witnesses being void, the judgment of the Ordinary admitting it to probate, is a nullity, and may be set aside at any time, upon motion. *Hooks vs. Stamper*..... 471

7. Where a widow applies for letters of administration, which is resisted and a will proven in solemn form: *Held*, that the widow cannot subsequently set aside the probate, on the ground that she was not 21 years of age. *Coalson vs. Tooke* 742

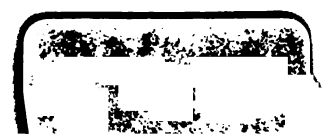
WITNESSES.

1. The regular mode of examining into general character, is to inquire of the witnesses whether they have the means of knowing the former witness' general character; and whether, from that knowledge, they would believe him on his oath. *Stokes vs. The State.* 7

2. A witness cannot disqualify himself by subsequent voluntary creation of an interest, wantonly or fraudulently. *Way vs. Arnold*..... 181

3. The pendency of a suit cannot prevent third persons from transacting business, *bona fide*, with one of the parties; and if an interest, in the event of the suit, is thereby acquired, the person thus becomes an incompetent witness. *Ibid.*

4. Where a person is called as an original witness to some transaction or agreement between the parties, in whose testimony they both have a common interest, it is not in the power of the witness or of either party to deprive the other of his testimony, by the creation of a subsequent interest, though not done with that view: *Aliter*, where the witness was not the agent of both parties nor an original witness to an agreement. *Ibid.*

5. Parties—when witnesses. *Wooten & Co. vs. Nall*..... 609
Davis & Mizell vs. Stanford 289
Neal vs. Lamar et al..... 746

See *Criminal Law*, 13. *Evidence*, 11.